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No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

COMMONWEALTH OF VIRGINIA, *et al.*,
Cross-Petitioners,

v.

UNITED STATES OF AMERICA,
Cross-Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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13 pp

QUESTION PRESENTED

Whether the court of appeals erred in holding that a State's single-sex admissions policy for a public undergraduate educational institution is unconstitutional unless the State provides substantively comparable single-sex educational opportunities for members of both genders.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, cross-petitioners include George F. Allen, Governor of the Commonwealth of Virginia; the State Council of Higher Education of Virginia; the Virginia Military Institute, its Board of Visitors and Superintendent; the VMI Foundation, Inc.; and the VMI Alumni Association. The following were also parties to the proceedings in the courts below: Joseph M. Spivey, III; John Williams Knapp; Thomas N. Downing; Brig. Gen. Elizabeth P. Hoisington; Robert Q. Marston; A. Courtland Spotts, III; Daniel F. Flowers; B. Powell Harrison, Jr.; Robert H. Spilman; Samuel E. Woolwine; James W. Enochs, Jr.; William A. Hazel; Harvey S. Sadow; Douglas K. Baumgartner; Daniel D. Cameron; Glen N. Jones; John W. Roberts; Gordon K. Davies.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	8

TABLE OF AUTHORITIES

Cases	Page
Hamilton v. Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251	3
Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982)	4,6
United States v. Virginia	3
VMI v. United States, 113 S. Ct. 2431 (1993)	2
Vorchheimer v. School Dist., 532 F.2d 880 (3d Cir. 1976), *aff'd by equally divided Court*, 430 U.S. 703 (1977)	5

Statutes and Rules

28 U.S.C § 1254(1)	2
S. Ct. R. 10.1(c)	7
S. Ct. R. 12.3	1
S. Ct. R. 13.5	1

Constitution

U.S. Const., amend XIV	3

Miscellaneous

R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* (7th ed. 1993)	*3*

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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Pursuant to this Court's Rules 12.3 and 13.5, cross-petitioners the Commonwealth of Virginia, Governor George F. Allen, the Virginia State Council of Higher Education, the Virginia Military Institute, its Board of Visitors and Superintendent, the VMI Foundation, Inc., and the VMI Alumni Association respectfully submit this conditional cross-petition for a writ of certiorari to review the judgment of the court of appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals regarding liability is reported at 976 F.2d 890, and is reproduced at pages 134a-157a of the appendix to the petition for a writ of certiorari in *United States v. Virginia*, No. 94-1941 (filed May 26, 1995) (hereinafter "Pet. App."). The opinion of the district

court regarding liability (Pet. App. 158a-245a) is reported at 766 F. Supp. 1407. The opinion of the court of appeals regarding remedy (Pet. App. 1a-52a) is reported at 44 F.3d 1229. The opinion of the district court regarding remedy (Pet. App. 53a-131a) is reported at 852 F. Supp. 471.

JURISDICTION

The judgment of the court of appeals regarding liability was entered on October 5, 1992. That judgment vacated and remanded the case to the district court for further proceedings. Pet. App. 156a. This Court denied a petition for a writ of certiorari seeking interlocutory review of that judgment. *VMI v. United States*, 113 S. Ct. 2431 (1993) (No. 92-1213).

After remedial proceedings in the district court on remand, cross-respondent filed a notice of appeal, and cross-petitioners filed a timely notice of cross-appeal challenging the original finding of liability. C.A. App. 407-09. The judgment of the court of appeals affirming and remanding the case for further proceedings (Pet. App. 30a) was entered on January 26, 1995.

On April 18, 1995, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 26, 1995. Cross-respondent the United States filed a petition on that date seeking review of the judgment below. *See United States v. Virginia*, No. 94-1941. Cross-petitioners received that petition on May 26, 1995. This cross-petition is therefore timely pursuant to this Court's Rules 12.3 and 13.5. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which provides in pertinent part that "[n]o State shall . . .

deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

The factual and procedural background relevant to the question presented in this conditional cross-petition is set forth in the statement included in the brief in opposition filed in No. 94-1941. In the event that the Court grants the petition in No. 94-1941, cross-petitioners ask that the Court also grant this cross-petition, which seeks review of the original determination of the court of appeals that in the absence of a parallel educational program for women the single-sex admissions policy maintained by the Virginia Military Institute (VMI) violates the Equal Protection Clause. Cross-petitioners do not seek this Court's review if certiorari is denied in No. 94-1941, however, because cross-petitioners are committed to supporting the Virginia Women's Institute for Leadership and are fully prepared to accept the remedial ruling below.

The court of appeals' finding of a constitutional violation was made in an earlier appeal in this case (Pet. App. 134a-157a) which resulted in a remand to the district court for remedial proceedings. Pet. App. 156a. This Court denied cross-petitioners' petition for a writ of certiorari to review that interlocutory judgment. *United States v. Virginia*, 113 S. Ct. 2431 (1993) (No. 92-1213).[1]

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[1] It is well settled that this denial of certiorari did not affect cross-petitioners' right to seek certiorari at a later stage of the proceedings. *See, e.g., Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 257-59 (1916); R. Stern, E. Gressman, S. Shapiro & K. Geller, *Supreme Court Practice* § 4.18, at 198 (7th ed. 1993) ("[d]enial of certiorari at the interlocutory stage of a proceeding is without prejudice to renewal of the questions presented when certiorari is later sought").

On remand, cross-petitioners proposed to remedy the purported constitutional violation by establishing a single-sex educational program for women, known as the Virginia Women's Institute for Leadership (VWIL). The district court approved that remedy. Pet. App. 53a-131a.[2]

On appeal, the court of appeals reaffirmed the legal standard that led to its original finding of liability, but upheld the remedy proposed by cross-petitioners and approved by the district court. The court then remanded for further remedial proceedings. Pet. App. 1a-52a.

REASONS FOR GRANTING THE WRIT

The court of appeals' liability determination is squarely inconsistent with the legal standard enunciated in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). *Hogan* makes clear that a single-sex admissions policy for a state-supported undergraduate institution is constitutional if the State shows [1] that "the classification serves 'important governmental objectives and [2] that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Id.* at 724.

In its decision below, the court of appeals conceded that VMI's single-sex admissions policy satisfies both prongs of the *Hogan* test. *See* Pet. App. 6a-7a, 20a-23a. First, the court found that "a state's opting for single-gender education as one particular pedagogical technique among many" is "a legitimate and important governmental objective." *Id.* at 21a. The court also reaffirmed its prior finding that VMI's adversative method offers additional educational benefits for adolescent males and is pedagogically justifi-

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[2] Cross-petitioners properly preserved their objections to the finding of liability by raising that issue in the subsequent proceedings below. *See* C.A. App. 407-09; Appellees' C.A. Br. 48.

able for that reason as well. *Id.* at 6a, 23a, 151a. And in this case, unlike *Hogan*, it is undisputed that attainment of these benefits through diversity of educational opportunities is the actual purpose underlying the single-sex admissions policies at VMI and VWIL. *Id.* at 23a, 81a-83a.[3] Thus, the first prong of the *Hogan* test is plainly satisfied here.[4]

Second, the court of appeals found that the Commonwealth's decision to provide single-sex education through VMI and VWIL was directly related to the achievement of the Commonwealth's legitimate and important objectives. As the court explained, "the only way to realize the benefits of homogeneity of gender is to limit admission to one gender." Pet. App. 22a.[5] In addition, the court concluded

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[3] Moreover, the record demonstrates conclusively that the Commonwealth's policy of providing the benefits of single-sex college education for men has not precluded women from benefiting in equal measure from the Commonwealth's system of higher education. The Commonwealth provides a wide array of educational opportunities for women at its 14 coeducational public undergraduate institutions, including the opportunity to attend highly regarded research institutions such as the University of Virginia, to obtain degrees in all of the subjects offered at VMI (and others as well), and to participate in a residential Corps of Cadets and ROTC program at Virginia Polytechnic Institute. Indeed, substantially more women than men enjoy the benefits of the Commonwealth's public system of higher education. The Commonwealth also provides financial assistance to female residents of Virginia who choose to attend one of the several private women's colleges in Virginia. Pet. App. 185a-191a, 200a-201a, 214a-218a.

[4] *Accord Vorchheimer v. School Dist.*, 532 F.2d 880, 887-88 (3d Cir. 1976), *aff'd by equally divided Court*, 430 U.S. 703 (1977).

[5] That fact serves to distinguish this case from *Hogan*, in which the record was "flatly inconsistent with the claim that excluding men from the School of Nursing is necessary to

[Footnote continued on next page]

that "[t]he classification for single-gender education at VMI is also directly related to achieving the results of an adversative method in a military environment," because "'the unique characteristics of VMI's program would be destroyed by coeducation.'" *Id.* at 6a-7a, 23a; *see also id.* at 146a-148a, 167a, 175a-176a. Thus, VMI's single-sex admissions policy is perfectly tailored to the achievement of the Commonwealth's legitimate objectives, and the second prong of the *Hogan* test is satisfied in this case.

Nonetheless, the court of appeals held that VMI's policy is invalid unless the Commonwealth provides a parallel program for women that offers "substantively comparable" educational opportunities. Pet. App. 17a, 155a. That holding impermissibly engrafts a third requirement onto the two-pronged *Hogan* test. As a result, it is directly contrary to *Hogan*, which made clear that a State *may* "confer a benefit only upon one class" as long as the "classification is substantially related to achieving a legitimate and substantial goal," *i.e.*, as long as the two prongs of the *Hogan* test are satisfied. 458 U.S. at 724, 731 n.17.[6]

[Footnote continued from previous page]

reach any of [the State's] educational goals." 458 U.S. at 731.

[6] In *Hogan*, of course, the State could not meet this requirement because, as a factual matter, the State's asserted goal was not "the actual purpose underlying the discriminatory classification" and the single-sex admissions policy was *not* "necessary to reach any of [the State's] educational goals." 458 U.S. at 730, 731. In this case, by contrast, the record conclusively demonstrates that VMI's single-sex admissions policy *is* substantially related to (and indeed absolutely necessary to) the valid and legitimate goals of providing the

[Footnote continued on next page]

Accordingly, the court of appeals has "decided a federal question in a way that conflicts with applicable decisions of this Court." Sup. Ct. R. 10.1(c). Review of this question is therefore warranted in the event the Court grants the petition in No. 94-1941.

[Footnote continued from previous page]

distinct benefits of single-sex education and the VMI method. Pet. App. 6a-7a, 22a-23a.

CONCLUSION

For the reasons set forth in the brief in opposition filed in No. 94-1941, the petition for a writ of certiorari in No. 94-1941 should be denied. If that petition is granted, however, this conditional cross-petition should also be granted in order to ensure the fullest consideration of all the issues presented by this case.

Respectfully submitted.

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CROSS-PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that a policy of admitting only men to the Virginia Military Institute's rigorous military-style educational program, while offering no parallel program to women, violated the Equal Protection Clause.

TABLE OF CONTENTS

	Page
Opinions below	2
Jurisdiction	2
Statement	3
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Dandridge v. *Williams*, 397 U.S. 471 (1970)	8
J.E.B. v. *Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994)	5
Mississippi Univ. for Women v. *Hogan*, 458 U.S. 718 (1982)	3, 5, 6, 7
VMI v. *United States*, 113 S. Ct. 2431 (1993)	2
Wengler v. *Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980)	7

Constitution:

U.S. Const.: Amend. XIV (Equal Protection Clause)	3, 4

Miscellaneous:

R.L. Stern, E. Gressman, S.M. Shapiro & K.S. Geller, *Supreme Court Practice* (7th ed. 1993)	8

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BRIEF FOR THE UNITED STATES IN OPPOSITION

On May 26, 1995, the United States filed a petition for a writ of certiorari (No. 94-1941) seeking review of the judgment of the United States Court of Appeals for the Fourth Circuit entered on January 26, 1995 (*VMI II*). In that decision, the court of appeals upheld the Commonwealth of Virginia's plan to remedy its unconstitutional sex-based exclusion of women from the Virginia Military Institute by offering women a separate and substantially different program at Mary Baldwin College. Cross-petitioners have filed an opposition to that petition, along with a conditional cross-petition for a writ of certiorari (No. 94-2107)

seeking review of the court of appeals' underlying decision on liability (*VMI I*). Cross-petitioners assert that their conditional cross-petition should be granted if the Court grants the United States' petition in No. 94-1941. As set forth below, the conditional cross-petition for a writ of certiorari should be denied.

OPINIONS BELOW

The opinion of the court of appeals regarding liability (*VMI I*) (App. 134a-157a)[1] is reported at 976 F.2d 890. The opinion of the district court regarding liability (App. 158a-245a) is reported at 766 F. Supp. 1407. The opinion of the court of appeals regarding remedy (*VMI II*) (App. 1a-52a) is reported at 44 F.3d 1229. The opinion of the district court regarding remedy (App. 53a-131a) is reported at 852 F. Supp. 471.

JURISDICTION

The judgment of the court of appeals regarding liability (*VMI I*) was entered on October 5, 1992. A petition for rehearing was denied on October 5, 1992. This Court denied a petition for a writ of certiorari. *VMI* v. *United States*, 113 S. Ct. 2431 (1993). The district court on remand approved a remedy. The United States appealed to challenge the remedy as inadequate, and cross-petitioners cross-appealed to challenge the original finding of liability. The judgment of the court of appeals regarding remedy (*VMI II*) was entered on January 26, 1995. The court of appeals voted sua sponte not to grant rehearing en

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[1] References to the appendix are to page numbers in the appendix to the petition for a writ of certiorari in *United States* v. *Virginia*, No. 94-1941 (filed May 26, 1995).

banc, and entered an order to that effect on April 28, 1995 (App. 246a-257a).

On April 28, 1995, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 26, 1995. The United States filed a petition on that date (No. 94-1941). The conditional cross-petition for a writ of certiorari was filed on June 23, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The procedural and factual background is set forth in the statement in the United States' petition for a writ of certiorari in No. 94-1941. Cross-petitioners conditionally challenge the court of appeals' initial decision in *VMI I* that providing a military-oriented education at the Virginia Military Institute (VMI) exclusively to men, while admittedly providing no opportunity for such an educational experience to women, violates the Equal Protection Clause. Cross-Pet. 3-4. They thus seek to argue, in the event that this Court grants certiorari in No. 94-1941, that the Commonwealth of Virginia may constitutionally maintain an all-male admissions policy at VMI and take no remedial steps whatsoever.

The court of appeals held in *VMI I* that VMI's male-only admissions policy violated the Equal Protection Clause under *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718 (1982). The court concluded that neither prong of the *Hogan* test was satisfied. First, VMI had not advanced the "exceedingly persuasive" justification for excluding women from VMI that *Hogan* requires. *Id.* at 724. In fact, cross-petitioners had not "advanced *any* state policy by which it can justify its determination * * * to afford VMI's

unique type of program to men and not to women." App. 137a (emphasis added); see also *id.* at 152a-155a. Second, even if the Commonwealth had demonstrated that it had a policy of providing single-gender education, and even if that policy constituted an important governmental interest, the court of appeals concluded that VMI's male-only admissions policy was not substantially related to furthering such an interest: "[T]he explanation of how [the Commonwealth's] policy is furthered by affording a unique educational benefit only to males is lacking. A policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender." *Id.* at 153a-154a. The court of appeals thus held that cross-petitioners had violated the Equal Protection Clause, and remanded for consideration of an appropriate remedy.

The district court approved a remedial plan that establishes an all-female Virginia Women's Institute for Leadership (VWIL) at Mary Baldwin College, a private, women's liberal arts college. App. 53a-131a. The VWIL plan was not based on the VMI model, and admittedly "differs substantially from the VMI program." *Id.* at 55a. The court of appeals affirmed. *Id.* at 1a-52a. Our petition for a writ of certiorari (No. 94-1941) to review the remedial decision is now pending.

ARGUMENT

The court of appeals' holding that the Equal Protection Clause prohibits the Commonwealth of Virginia from offering the benefits of the Virginia Military Institute's unique educational program only to men, while offering no parallel program to women,

turns on a straightforward application of *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718 (1982). The parties and courts below all recognized that VMI's male-only admissions policy must satisfy the *Hogan* test, and the court of appeals correctly concluded that it failed to do so. That decision does not conflict with any decision of this Court or any other court of appeals. As this Court has already determined in denying the cross-petitioners' earlier petition for a writ of certiorari to review the liability judgment, that decision warrants no further review.

The cross-petition is based entirely on the erroneous assertion that "the court of appeals conceded that VMI's single-sex admissions policy satisfies both prongs of the *Hogan* test."[2] Cross-Pet. 4. The court of appeals made no such "concession." Rather, as to the first prong, the court of appeals held in *VMI I* that the Commonwealth "failed to articulate an important policy that substantially supports offering the unique benefits of a VMI-type education to men and not to women." App. 155a.[3] Even assuming that the

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[2] Under that test, the Commonwealth had the burden to show "an exceedingly persuasive justification" for VMI's exclusion of women, *i.e.* that VMI's admissions policy (1) serves important governmental objectives, and (2) is substantially related to the achievement of those objectives. *Hogan*, 458 U.S. at 724; see also *J.E.B.* v. *Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1425 (1994).

[3] See App. 137a (Virginia had not "advanced any state policy by which it can justify its determination, under an announced policy of diversity, to afford VMI's unique type of program to men and not to women"); *id.* at 152a ("the Commonwealth of Virginia has not revealed a policy that explains why it offers the unique benefit of VMI's type of education and training to men and not to women"); *id.* at 155a

Commonwealth had asserted the required "important governmental objective," *Hogan*, 458 U.S. at 724, the court further held in *VMI I* that VMI's male-only admissions policy was not substantially related to achieving that objective. The court stated that Virginia "has not adequately explained how the maintenance of one single-gender institution gives effect to * * * the governmental objective advanced to support VMI's admissions policy, a desire for educational diversity." App. 154a.[4]

Cross-petitioners attempt to characterize the court of appeals' liability judgment in *VMI I* as conflicting rather than comporting with *Hogan* by quoting out-of-context from the decision in *VMI II* upholding the *remedy* in this case. They thus suggest (Cross-Pet. 4-6) that the court's conclusions in *VMI II* about the importance of single-sex education when provided to both men and women supports providing single-sex education to men only. They further suggest (*id.* at

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("As the record stands, * * * evidence of a legitimate and substantial state purpose is lacking."). Indeed, the court noted that the only policy statement in the record "in which the Commonwealth has expressed itself with respect to gender distinctions" requires that its colleges and universities treat students "*without regard to sex, race, or ethnic origin.*" App. 153a (emphasis in opinion).

[4] See App. 153a-154a ("If VMI's male-only admissions policy is in furtherance of a state policy of 'diversity,' the explanation of how the policy is furthered by affording a unique educational benefit only to males is lacking. A policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender."); *id.* at 154a ("no explanation is apparent as to how one institution with autonomy, but with no authority over any other state institution, can give effect to a state policy of diversity among institutions").

5-6) that the court's characterization of the exclusion of women from VMI and men from VWIL as a means "perfectly tailored" to the achievement of dual single-sex schools helps to justify a policy of excluding women from VMI without providing them *any* parallel opportunity. As the court held in *VMI I*, providing single-sex education exclusively to males is not an important objective under *Hogan*;[5] at no stage of this litigation did the court of appeals hold otherwise.

Petitioners also contend that the court of appeals in *VMI I* "impermissibly engraft[ed] a third requirement onto the two-pronged *Hogan* test." Cross-Pet. 6. Here, again, cross-petitioners quote out-of-context from the court of appeals' *VMI II* decision regarding remedy,[6] attempting to attack the court's liability

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[5] The *Hogan* Court expressly rejected the same argument—*i.e.*, that the women-only admissions policy of the Mississippi University for Women's School of Nursing was justified by the State's interest in preserving for women the benefit of an all-women's school:

> Since any gender-based classification provides one class a benefit or choice not available to the other class, * * * that argument begs the question. The issue is not whether the benefited class profits from the classification, but whether the State's decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal.

458 U.S. at 731 n.17; see also *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142, 151 (1980).

[6] In evaluating the VWIL remedy, the court of appeals concluded that:

> the alternatives left available to each gender by a classification based on homogeneity of gender need not be the

determination by reference to the three-part "special intermediate scrutiny test" announced in its remedy decision—a test that did not even exist at the time liability was established. And even if that three-part test were applicable to review of the liability judgment, the third step would not come into play because the court of appeals at the liability stage correctly held that the first two steps had not been satisfied.[7]

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same, but they must be substantively comparable so that, in the end, we cannot conclude that the value of the benefits provided to one gender tends, by comparison to the benefits provided to the other, to lessen the dignity, respect, or societal regard of the other gender. We will call this third step an inquiry into the substantive comparability of the mutually exclusive programs provided to men and women.

App. 17a.

[7] In defending the judgment of liability, we do not endorse all aspects of the reasoning of the court of appeals' liability decision; nor, of course, would this Court implicitly do so by denying the cross-petition. Correspondingly, to the extent that the court of appeals' remedial determination seeks support in that court's earlier opinion on liability, this Court would remain free, in reviewing No. 94-1941, to reject any of the reasoning of the lower court in either opinion. See *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970); R.L. Stern, E. Gressman, S.M. Shapiro & K.S. Geller, *Supreme Court Practice* 363-364 (7th ed. 1993).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER TERM, 1995

No. 94-2107
COMMONWEALTH OF VIRGINIA, *et al.*,
Cross-Petitioners,
v.
UNITED STATES OF AMERICA,
Cross-Respondent.

On Petition For Writ Of Certiorari to the United States Court Of Appeals For The Fourth Circuit

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REPLY BRIEF FOR THE CROSS-PETITIONERS

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1. The purpose of this cross-petition is to maintain the principle that States may offer single-sex educational opportunities on the basis of student demand and institutional interests where legitimate pedagogical justifications exist for doing so, without thereby violating the Constitution. Cross-respondent errs in suggesting (Br. in Opp. 3) that cross-petitioners seek to "maintain an all-male admissions policy at VMI and take no remedial steps whatsoever." To the contrary, as previously explained (Cross-Pet. 3), cross-petitioners support the remedy approved by the court of appeals and are taking all necessary steps to ensure the success of the VWIL program in accordance with the rulings below.[1]

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[1]If anything, it is cross-respondent, not cross-petitioners, who seeks to destroy VWIL and the unique benefits it offers to college-age women. Under cross-respondent's

[Footnote continued on next page]

2. The unmistakable import of the court of appeals' opinions in this case is to preclude the States from offering the option of single-sex education to members of one gender unless a "parallel" and "substantively comparable" single-sex educational opportunity is offered to members of the other gender. Cross-respondent asserts (Br. in Opp. 4-5) that the court of appeals' holding in this regard follows directly from *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). Nothing in *Hogan* supports this assertion.

To the contrary, the *Hogan* Court's careful analysis of the proffered state objective and the relationship between that objective and the challenged classification (*see* 458 U.S. at 727-31) would have been wholly superfluous if, as cross-respondent suggests and the court below held, the absence of any state-provided single-sex educational opportunity for the excluded gender was *itself* sufficient to render the challenged admissions policy unconstitutional. Under the court of appeals' view of the law, the Court's opinion in *Hogan* could have ended with its first footnote, which observed that "Mississippi maintains no other single-sex public university or college." 458 U.S. at 720 n.1. That the *Hogan* Court instead evaluated the legitimacy of the challenged single-sex admissions policy *without regard to the absence of an analogous program for members of the excluded gender* demonstrates the fallacy of cross-respondent's argument (Br. in Opp. 5) that the liability

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[Footnote continued from previous page]

proposed interpretation of the Equal Protection Clause, VWIL's continued existence would be problematic at best, because the Commonwealth does not offer an identical educational experience to male students. *See* 94-1941 Pet. 16-29.

decision in this case reflects "a straightforward application" of *Hogan*.

3. Cross-respondent also errs in denying (Br. in Opp. 5-6) that the court of appeals' opinions demonstrate VMI's compliance with the two-pronged *Hogan* test. Indeed, as previously demonstrated (Cross-Pet. 4-6), the court's second opinion (*VMI II*) is quite clear on this point. Cross-respondent appears to contend (Br. in Opp. 6-7) that this Court is precluded from considering the findings in *VMI II* insofar as they shed light on the liability issue, but cross-respondent offers no authority for that novel assertion. In any event, the court of appeals' original opinion on liability (*VMI I*) also demonstrates that VMI's single-sex admissions policy satisfies the two-pronged *Hogan* test.

In *VMI I*, the court concluded that "VMI's male-only policy is justified by its institutional mission." Pet. App. 151a. The court based that conclusion on findings that "single-sex education is pedagogically justifiable, and VMI's system . . even more so," *id.*, and that the exclusion of women from VMI is essential to the Commonwealth's ability to offer the unique VMI opportunity "because the change caused by th[e] admission [of women] would destroy the opportunity." *Id.* at 148a. These findings demonstrate that VMI's single-sex admissions policy passes muster under *Hogan*, because VMI "serves 'important governmental objectives'" and the "'means employed' are 'substantially related to the achievement of those objectives.'" 458 U.S. at 724.

Rather than conclude its analysis at this point, however, the court of appeals went on to impose a separate and additional requirement, namely, that the Commonwealth independently justify its failure to provide a parallel single-sex educational opportunity for women. *See* Pet. App. 151a-56a; *accord id.* at 7a, 17a (*VMI II*). It was only by creating this additional requirement that the court of appeals was able to conclude that VMI failed to pass muster. Thus,

cross-respondent's reliance (Br. in Opp. 5-6 & nn.3-4) on the court of appeals' conclusion in this regard is entirely misplaced, because it begs the key question whether the court erred in engrafting this additional requirement onto *Hogan* in the first place.[2]

4. Finally, cross-respondent persists in mischaracterizing the nature of the state interest at issue in this case. Rather than pursuing a goal of "providing single-sex education exclusively to males" (Br. in Opp. 7), as cross-respondent would have it, the Commonwealth has instead consistently sought to foster educational diversity by providing a wide array of educational opportunities (including the unique benefits of single-sex education) within the limitations imposed by finite resources, student demand, and the autonomous responses of individual educational institutions to those factors. That objective is plainly a legitimate one (*see* Pet. App. 21a), and cross-respondent's suggestions to the contrary are without merit.

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[2]Cross-respondent denies (Br. in Opp. 7-8) that the court of appeals created a third requirement in addition to the two-pronged *Hogan* test. As already explained, however (*see supra* at 2-4; Cross-Pet. 6), nothing in *Hogan* supports the proposition that any time a State offers pedagogically justified single-sex educational opportunities to members of one gender it must also offer a parallel program to members of the other gender, regardless of the level of demand for that program, the pedagogical value of the program, and the relative importance of competing uses for the State's limited educational resources.

CONCLUSION

For the reasons set forth in the brief in opposition filed in No. 94-1941, the petition for a writ of certiorari in No. 94-1941 should be denied. If that petition is granted, however, the conditional cross-petition in No. 94-2107 should also be granted.

Respectfully submitted.

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IN THE
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BRIEF FOR THE CROSS-PETITIONERS

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QUESTION PRESENTED

Whether the Equal Protection Clause permits a State to offer a pedagogically beneficial single-sex college program as a complement to a large and diverse statewide system of public and private higher education that provides extensive and varied educational opportunities for both men and women.

TABLE OF CONTENTS

QUESTION PRESENTED.....i
TABLE OF CONTENTS.....i
TABLE OF AUTHORITIES iv
INTRODUCTION..... 1
OPINIONS BELOW 4
JURISDICTION 4
CONSTITUTIONAL PROVISION INVOLVED 5
STATEMENT 5
A. Background..... 5
1. Virginia's System of Higher Education 5
2. Virginia Military Institute 10
B. Initial Proceedings Below..... 14
1. The District Court's Liability Decision..... 14
2. The Court of Appeals' Liability Decision.... 18
SUMMARY OF ARGUMENT 20
ARGUMENT 23
I. PUBLICLY SPONSORED SINGLE-SEX EDUCATIONAL PROGRAMS ARE CONSTITUTIONALLY PERMISSIBLE IF THEY ARE SUBSTANTIALLY RELATED TO THE ACHIEVEMENT OF AN IMPORTANT GOVERNMENTAL OBJECTIVE..... 23
II. VMI'S SINGLE-SEX ADMISSIONS POLICY ADVANCES IMPORTANT GOVERNMENTAL OBJECTIVES 24

A. Providing The Benefits Of Single-Sex College Education And Accomplishing The Objectives Attainable Under The VMI Method Are Important Governmental Objectives 24

B. Virginia Has Thoughtfully, Reasonably, And Carefully Structured And Implemented Its Decision To Provide Its Citizens With The Benefits Of Single-Sex Education And The VMI Method..... 28

III. VMI'S SINGLE-SEX ADMISSIONS POLICY IS SUBSTANTIALLY RELATED TO ACHIEVING THE IMPORTANT GOVERNMENTAL OBJECTIVES OF PROVIDING THE BENEFITS OF A SINGLE-SEX COLLEGE EDUCATION AND THE VMI METHOD AND ENHANCING DIVERSITY IN HIGHER EDUCATION 33

IV. THE EQUAL PROTECTION CLAUSE DOES NOT REQUIRE STATES TO OFFER PARALLEL SINGLE-SEX EDUCATIONAL OPPORTUNITIES TO MEMBERS OF EACH GENDER WITHOUT REGARD TO STUDENT INTEREST OR THE EXISTENCE OF OTHER PUBLIC AND PRIVATE EDUCATIONAL OPPORTUNITIES..... 36

A. The *Hogan* Test Is Satisfied By The Commonwealth's Showing That VMI's Single-Sex Admissions Policy Is Substantially Related To The Achievement Of Important Governmental Objectives... 36

B. The Equal Protection Clause Does Not Require Creation Of Parallel Single-Sex Programs In The Absence Of Significant Demand Where The Overall Educational Opportunities Available To Each Gender Are Equivalent 43

CONCLUSION 46

TABLE OF AUTHORITIES

Cases:

Ambach v. Norwick, 441 U.S. 68 (1979) 24

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)..... 32

Committee for Public Educ. v. Nyquist, 413 U.S. 756 (1973)..... 25

Garrett v. Board of Educ., 775 F. Supp. 1004 (E.D. Mich. 1991)..... 40

Hogan v. Mississippi Univ. for Women, 646 F.2d 1116 (5th Cir. 1981), aff'd, 458 U.S. 718 (1982)..... 17

Jenness v. Fortson, 403 U.S. 431 (1971)..... 25

Keyishian v. Board of Regents, 385 U.S. 589 (1967)..... 25

Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981) 46

Milliken v. Bradley, 418 U.S. 717 (1974) 25

Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982)..... *passim*

Norwood v. Harrison, 413 U.S. 455 (1973) 24, 41

Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978)..... 32

Rostker v. Goldberg, 453 U.S. 57 (1981) 44

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)..... 25

Sweezy v. New Hampshire, 354 U.S. 234 (1957)..... 25

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 32

Other Authorities:

28 U.S.C. § 1254(1) 5

Va. Code § 22.1-212.1:1 ..... 20, 41

Va. Code § 23-9.6:1(2) 30

Va. Code §§ 23-30.39 - 23-30.58 8

Va. Code §§ 23-38.11 - 23-38.18 8

Va. Code §§ 23-38.30 - 23-38.44:3 8

Va. Code §§ 23-38-45 - 23-38.50 8

Va. Code §§ 23-38.53:1 - 23-38.53.3 8

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Va. Code §§ 23-92 - 23-104 30

Va. Const. art. VIII, § 11 8

AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., GROWING SMART: WHAT'S WORKING FOR GIRLS IN SCHOOL, EXECUTIVE SUMMARY AND ACTION GUIDE (1995) 40

Richard Hawley, *A Case For Boys' Schools*, *in* SINGLE-SEX SCHOOLING: PROPONENTS SPEAK, A SPECIAL REPORT FROM THE OFFICE OF EDUCATIONAL RESEARCH & IMPROVEMENT, U.S. DEP'T OF EDUC. (Debra Hollinger & Rebecca Adamson, eds.) 11 (1992) 39

Mikyong Kim & Rodolfo Alvarez, *Women-Only Colleges: Some Unanticipated Consequences*, 66 J. HIGHER EDUC. 640 (Nov./Dec. 1995) 39

Valerie E. Lee & Anthony S. Bryk, *Effects of Single-Sex Secondary Schools on Student Achievement and Attitudes*, 78 J. EDUC. PSYCH. 381 (1986) 40

Tim Poor, *Schools Try Same-Sex Classrooms*, ST. LOUIS POST-DISPATCH, Aug. 7, 1994, at 1A 40

Cornelius Riordan, *The Case For Single-Sex Schools*, *in* SINGLE-SEX SCHOOLING: PROPONENTS SPEAK, A SPECIAL REPORT FROM THE OFFICE OF EDUCATIONAL RESEARCH & IMPROVEMENT, U.S. DEP'T OF EDUC. (DEBRA HOLLINGER & REBECCA ADAMSON, EDS.) 47 (1992) 40

Ron Russell & John Wilson, *32 Girls + Science = Success*, DET. NEWS, July 18, 1995, at D1 40

Eric Wee, *A Lesson in Confidence: Va. Middle School Tries All-Girl Classes*, WASH. POST, May 1, 1995, at A1 .....40, 41

U.S. DEP'T OF EDUC., NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS 195 (1994) 45

Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?*, 105 Harv. L. Rev. 1741 (1992) 39

Single-Sex Math Class Gaining In Popularity, PHOENIX GAZETTE, Nov. 5, 1994, at A18 40

IN THE

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BRIEF FOR THE CROSS-PETITIONERS

Cross-petitioners the Commonwealth of Virginia, Governor George F. Allen, the State Council of Higher Education for Virginia, the Virginia Military Institute, its Board of Visitors and Superintendent, the VMI Foundation, Inc., and the VMI Alumni Association respectfully submit this brief in support of the constitutionality of the single-sex education component of Virginia's system of higher education.

INTRODUCTION

This case involves the circumstances, if any, under which

the Equal Protection Clause of the Fourteenth Amendment permits a State to support single-sex education at one or more of its institutions of higher education.

Virginia maintains a higher education system that is overwhelmingly coeducational, but which includes an option for a small number of students to attend a single-gender public college. Virginia also provides financial support for numerous private colleges, most of which are coeducational, but five of which have single-sex admissions policies.

This litigation was initiated by the United States to challenge the male-only single-sex admissions policy of the Virginia Military Institute (VMI) at a time when all of Virginia's other 14 public colleges were coeducational. The court below held that Virginia had established ample justification for a single-sex component in its diverse educational spectrum, but had not justified its determination to afford that opportunity to men and not women.

After that decision, Virginia created a single-sex college program for women, known as the Virginia Women's Institute for Leadership (VWIL), at Mary Baldwin College (MBC), a women-only private college. The courts below have now approved the constitutionality of Virginia's higher education system as presently constituted, with its predominantly coeducational emphasis and limited and comparable single-sex components for men and women.

In *United States v. Commonwealth of Virginia*, No. 94-1941, this Court granted the Government's petition for a writ of certiorari challenging the decision below. Cross-petitioners will defend that decision in their brief as respondents in No. 94-1941. The Court also granted cross-petitioners' conditional cross-petition for a writ of certiorari (No. 94-2107) challenging the initial determination by the court below that Virginia could not continue VMI as a male-only public college without establishing a comparable

facility for women. That issue will be addressed in this brief.[1]

Cross-petitioners maintain that the initial decision below concerning liability is not required by this Court's equal protection jurisprudence and will unduly and unnecessarily inhibit States in the development of programs to meet the special and demonstrated needs of their citizens. The liability ruling has the effect of precluding government-sponsored single-sex education for students of one gender absent a parallel program for students of the other gender. That standard does not permit States to take into account the pedagogical value of single-sex education for some students, the differing educational needs and interests of students, the judgment of educators in developing programs, the overall mix of educational options made available to students in the public and private sectors, or the importance of state and local discretion in devising beneficial and effective means of education for students of both genders within the financial constraints imposed on funding for education. For the reasons set forth in this brief, the court of appeals erred in restricting the ability of government to use single-sex educational programs as one part of a broad spectrum of educational approaches professionally designed to respond to the varied needs and preferences of students of all ages.

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[1]Cross-petitioners are committed by legislation to single-sex education as a beneficial pedagogical option for both men and women and intend to continue offering this option through VMI and VWIL even if this Court holds that parallel programs are not a prerequisite to a State's ability to offer the benefits of single-sex education to its citizens. Cross-petitioners merely seek to preserve the discretion of state and local governments to improve and diversify all levels of their educational systems through innovative and successful programs similar to those at VMI and VWIL.

OPINIONS BELOW

The opinion of the court of appeals regarding liability is reported at 976 F.2d 890, and is reproduced at pages 134a-157a of the appendix to the petition for a writ of certiorari in *United States v. Virginia*, No. 94-1941 (filed May 26, 1995) (hereinafter "Pet. App."). The opinion of the district court regarding liability (Pet. App. 158a-245a) is reported at 766 F. Supp. 1407. The opinion of the court of appeals regarding remedy (Pet. App. 1a-52a) is reported at 44 F.3d 1229. The opinion of the district court regarding remedy (Pet. App. 53a-131a) is reported at 852 F. Supp. 471.

JURISDICTION

The judgment of the court of appeals regarding liability was entered on October 5, 1992. That judgment vacated and remanded the case to the district court for further proceedings. Pet. App. 156a. This Court denied a petition for a writ of certiorari filed by cross-petitioners seeking interlocutory review of that judgment. *VMI v. United States*, 113 S. Ct. 2431 (1993) (No. 92-1213).

After remedial proceedings in the district court on remand, cross-respondent filed a notice of appeal, and cross-petitioners filed a timely notice of cross-appeal challenging the original finding of liability. The judgment of the court of appeals affirming and remanding the case for further proceedings (Pet. App. 30a) was entered on January 26, 1995.

On April 18, 1995, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 26, 1995. Cross-respondent the United States filed a petition on the latter seeking review of the judgment below. *See United States v. Virginia*, No. 94-1941. Cross-petitioners received that petition on May 26, 1995, and filed a timely cross-petition for a writ of certiorari on June 26, 1995, pursuant to this Court's Rules

12.3 and 13.5. This Court granted both the petition and the cross-petition on October 5, 1995. The jurisdiction of this Court is founded upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, which provides in pertinent part that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

A. Background

1. Virginia's System of Higher Education

The Commonwealth of Virginia provides financial support for a "diverse array" of public and private colleges and universities. Pet. App. 187a. The State Council of Higher Education for Virginia (SCHEV) has declared that "'Virginia has always recognized that there are many kinds of excellence and has supported a diversity of missions among its institutions of higher education.'" *Id.* Indeed, "[o]ne special characteristic of the Virginia system is its diversity," and Virginia's colleges and universities "collectively form one of the most diverse -- and increasingly excellent -- systems of higher education in the nation." I DX 23 at 11 (I JA 1707).[2] In furtherance of this express

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[2] "I DX" refers to defendants' (*i.e.*, cross-petitioners') exhibits at the liability trial. "II DX" refers to cross-petitioners' exhibits at the remedy trial. "I Tr." and "II Tr." refer to the transcripts of the liability and remedy trials, respectively. "I JA" and "II JA" refer to the joint appendices filed in the court of appeals at the liability and remedy stages, respectively. "L." refers to the parties' joint lodging in this Court of materials from the record.

policy of providing a wide spectrum of educational opportunities and experiences, the Boards of Visitors of the various public colleges and universities in Virginia "have traditionally enjoyed, and now enjoy, broad autonomy in the determination of such issues as the institution's mission . . . and the composition of its student body." Pet. App. 187a; *see also id.* at 138a-39a. In short, "the hallmarks of Virginia's educational policy are 'diversity and autonomy.'" *Id.* at 187a.

There are more than a dozen public four-year undergraduate institutions in Virginia, including the University of Virginia (one of the Nation's leading universities) and other schools that have been recognized regionally or nationally for academic excellence. Pet. App. 185a-86a; Stipulations of Fact ("Stips.") 41-42 (I JA 86-87; L. 68-69).[3] These four-year institutions enrolled 85,441 women and 72,819 men in 1989. Pet. App. 187a.

Although almost all of Virginia's public colleges and universities are presently coeducational, Virginia has a long-standing tradition of supporting single-sex education. Most of Virginia's public colleges and universities originally offered single-sex education. Four of these public institutions -- Longwood College, James Madison University, Mary Washington College, and Radford University -- originally admitted women only. Pet. App. 175a n.10,

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[3]Virginia's public four-year undergraduate institutions include: Christopher Newport College, Clinch Valley College, College of William and Mary, George Mason University, James Madison University, Longwood College, Mary Washington College, Norfolk State University, Old Dominion University, Radford University, University of Virginia, Virginia Commonwealth University, Virginia Military Institute, Virginia Polytechnic Institute and State University, and Virginia State University. Pet. App. 185a-86a.

185a-87a. These institutions chose to become coeducational only in the late 1960's and early 1970's as a result of financial pressures and the growing popularity of coeducation. II Tr. 642, 660; *see also* I JA 173-75, 212-13.

The Commonwealth's sponsorship of public single-sex undergraduate programs is only one part of its overall support for single-sex education. Virginia has long recognized that "'[h]igher education resources should be viewed as a whole -- public and private.'" Pet. App. 191a; *see* Stips. 26, 28-32 (I JA 71, 73-77; L. 53, 55-59). The State Council is charged with the task of preparing and implementing a master plan for higher education in Virginia that takes into account the missions, programs, and enrollment of all institutions of higher education in the Commonwealth, both public and private, with the goal of providing diverse educational opportunities without unnecessary duplication. Stips. 86-87 (I JA 81-82; L. 113-14). Thus, "Virginia relies on its independent [*i.e.*, private] institutions [of higher education] to offer students choices and meet the educational needs of people in the Commonwealth." Pet. App. 191a.

There are approximately 36 private colleges and universities authorized to award undergraduate degrees in Virginia. II DX 16 at 109-37. Five of these institutions are four-year colleges that provide single-sex education. Hampden-Sydney College provides undergraduate education for men, while Randolph-Macon Women's College, Mary Baldwin College, Sweet Briar College, and Hollins College provide undergraduate education for women. In the fall of 1989, 3850 women and 2256 men were enrolled in public and private single-sex colleges in Virginia. Pet. App. 189a.

The Virginia Constitution itself recognizes the important role played by private educational institutions in enhancing the diversity of the Commonwealth's overall educational system. In the early 1970's, as Virginia's public women's

colleges were moving to coeducation, the people of Virginia twice amended their constitution to make clear that public funds could be used to support private higher education. Va. Const. art. VIII, § 11; Stips. 26-27 (I JA 71-72; L. 53-54). This provision has been recognized as "'an implicit endorsement of the principle of pluralism in higher education. Its value judgments are twofold: that if private institutions closed their doors, the Commonwealth would have to find the money to educate students who would otherwise have been in a private institution and Virginia's rich tradition of diversity in higher education would be notably weakened.'" Stips. 28 (I JA 73; L. 55).

The Virginia General Assembly has implemented this constitutional mandate through the Tuition Assistance Grant Program, the College Scholarship Assistance Program, and various other state-financed aid programs[4] that provide scholarship grants, guaranteed loans, and work-study funds for students attending private colleges in Virginia, including single-sex colleges. Pet. App. 190a-91a; Stips. 55-59 (I JA 100-04; L. 82-86). In addition, the Commonwealth provides financial support and other assistance to private institutions (including single-sex colleges) through low-cost building loans, state-funded services contracts, and other programs. Stips. 54-55, 59-60, 62-63 (I JA 99-100, 104-05, 107-08; L. 81-82, 86-87, 89-90); Va. Code §§ 23-30.39 to -30.58. The State Council of Higher Education views these programs as a "means by which the Commonwealth can provide funding to its independent

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[4]*See, e.g.*, Va. Code §§ 23-38.11 to -38.18 (Tuition Assistance Grant Act); *id.* §§ 23-38.30 to -38.44:3 (Virginia Student Assistance Authorities); *id.* §§ 23-38.45 to -38.50 (College Scholarship Assistance Act); *id.* §§ 23-38.53:1 to -38.53:3 (Virginia Scholars Program); *id.* §§ 23-38.70 to 23-38.71 (Virginia Work-Study Program).

institutions, thereby helping to maintain a diverse system of higher education." I DX 21 at 10 (I JA 1694) (SCHEV Budget Initiatives for 1990-1992: A Concept Paper).

In the aggregate, Virginia's financial support for private single-sex education for women is substantial. I DX 74 (I JA 1971-80; L. 235-45); II DX 13 & 14. This aid "'demonstrates the Commonwealth's commitment to private higher education'" and "'is as much of an institutional support program as it is a program to assist students.'" Stips. 56 (I JA 101; L. 83).

As part of its broad and varied educational system, Virginia offers college students the option of military training through participation in federally funded Reserve Officer Training Corps (ROTC) programs at several public colleges and universities in Virginia, including the University of Virginia, Virginia Polytechnic Institute and State University, VMI, Norfolk State University, Old Dominion University, and James Madison University. Stips. 46-47 (I JA 91-92; L. 73-74). In addition, students at several private colleges in Virginia, including all of the private four-year women's colleges, have the option of participating in ROTC programs. *Id.*

Yet another aspect of Virginia's broad menu of higher education choices is the coeducational residential Corps of Cadets program at Virginia Polytechnic Institute and State University (VPI). VPI is a large public coeducational university that has been listed among the Nation's finest undergraduate institutions. Stips. 42 (I JA 87; L. 69). VPI has more academic course offerings and undergraduate degree programs than VMI, and offers all of the courses (including military instruction) available at VMI. Pet. App. 168a; Stips. 42 (I JA 87; L. 69); I DX 62D, 62E, 62M (I JA 1780-81, 1789; L. 231, 234).

VPI's Corps of Cadets enrolled approximately 360 stu-

dents, including 45 women, in 1993. II DX 88 (L. 344). The mission of the VPI Corps of Cadets is "to produce men and women . . . who are honorable, educated and trained for military service to their country and prepared to be effective leaders in the varied work of military and civil life." Pet. App. 214a.

VPI cadets are required to adhere to military-type regulations and discipline. The Corps of Cadets is organized along military lines, with a chain of command based on a cadet rank system. Cadets are awakened with reveille each morning at 5:30 a.m., march together in formation each day to breakfast and dinner, and participate in scheduled and unscheduled room inspections, uniform inspections, formations, roll calls, and military drills. Pet. App. 217a; Stips. 49, 51 (I JA 94, 96; L. 76, 78).

2. Virginia Military Institute

VMI was founded in 1839 and is a small public four-year college with an enrollment of about 1250 students. It offers majors in the liberal arts, sciences, and engineering. All of its academic offerings are also available at other public colleges and universities in Virginia. Pet. App. 168a; I DX 62C, 62D, 62E, 62M (I JA 1779-81, 1789; L. 230-31, 234).

VMI's mission is "to produce educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary." Pet. App. 203a. VMI employs an "adversative" method for developing character and leadership in young men. That method is intended to cause students to question their past convictions, values and experiences and thereby to prepare them to accept the values and behavior taught by VMI. *Id.* at 175a n.10, 189a, 191a-92.

"Physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior,

and indoctrination in desirable values are the salient attributes of the VMI educational experience." Pet. App. 191a-92a. First-year VMI students are subjected to an extreme form of the adversative model, "comparable to Marine Corps boot camp in terms of both the physical rigor and mental stress of the experience." *Id.* at 194a-95a.

VMI utilizes a "class system" which assigns specific privileges and responsibilities to each class of cadets in order to develop character and leadership. Thus, the first class, or seniors, are responsible for providing overall leadership, writing the standard operating procedures for aspects of the adversative system, and serving as mentors to new cadets. "The class system is a very highly-developed system for cultivating leadership," as it "teaches and reinforces through peer pressure the values and behaviors that VMI exists to promote." Pet. App. 196a.

Cadets at VMI are subject to an honor code, which provides that a cadet "does not lie, cheat, steal nor tolerate those who do." Pet. App. 197a. The honor code "dominates all facets of institutional life" and is enforced by an "honor court" made up of cadets elected by their classmates. *Id.*

Students at VMI live in a four-story barracks housing one class per floor. "There is a total lack of privacy" in the barracks: there are no door locks or window shades, and the doors to the students' rooms contain windows that permit "the officer in charge to . . . see every cadet without anything being hidden." Pet. App. 198a-99a. The barracks features group bathrooms[5] and "close and intimate

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[5]There is one bathroom on each floor, serving up to 400 students. Each bathroom has group showers with about 24 heads. There are no doors on the partitions separating each toilet. Pet. App. 128a, 240a.

quarters." *Id.* In short, "there is literally no place in the barracks that physically affords privacy," and students are thus "under constant scrutiny." *Id.* at 198a, 199a. This total lack of privacy and constant supervision by the entire Corps is an integral part of the VMI experience. *Id.* at 199a.

Strict egalitarianism is a central and essential attribute of the VMI method. "The VMI experience is based on absolute equality, which is achieved through treating everyone in exactly the same way." Pet. App. 237a. The spartan and public nature of life in the barracks "is an aspect of the egalitarian ethic at VMI," as is the fact that VMI imposes the same physical requirements on all students, regardless of ability. *Id.* at 198a, 233a. Every effort is made to subordinate physical or material distinctions among cadets by requiring all cadets to wear the same uniforms, live in the same spare quarters, attain the same level of physical fitness, and undergo the same constant scrutiny by the other cadets.

Unlike the federal military academies, which exist to prepare their graduates for career service in the armed forces, VMI "is directed at preparation for both military and civilian life." Pet. App. 219a. Thus, VMI's military emphasis is primarily a teaching device, designed to serve "the function of teaching self-discipline," and "is a means to an end, not an end in itself." *Id.* at 206a. Although each VMI student must participate in an ROTC program that provides the same training for a military career as the ROTC programs offered at other undergraduate institutions in Virginia, only 15 percent of VMI graduates choose military careers, and "VMI has gone to considerable lengths to assure the public that it is not simply a military college." *Id.* at 219a.

VMI "has been successful in accomplishing [its] goals; specifically, instilling physical and mental discipline, char-

acter, and a kind of moral code." Pet. App. 204a. Indeed, "[t]he school's success and reputation are uncontroverted." *Id.* at 138a. "[A]ll parties . . . acknowledge . . . the positive and unique aspects of the program." *Id.* at 137a.

In 1983, VMI's Board of Visitors created a Mission Study Committee to reexamine the appropriateness of VMI's single-sex admissions policy. A majority of the Committee's members (including the president of a women's college) did not graduate from VMI. The Committee reviewed materials on education and women in the military and made site visits to single-sex and newly coeducational institutions. Pet. App. 208a-12a. After a three-year study, the Committee issued its final report in 1986. *Id.* at 212a. The Committee "found that the admission of women into the VMI Corps of Cadets would alter the mission of VMI" and would require adjustments "in the military and physical demands made upon male cadets" that "contribute to the ethos of which the Virginia Military Institute is proud and which, it is firmly believed, contributes to the unity of the Corps." *Id.* at 212a, 213a-14; I DX 40 at 2 (I JA 1721; L. 196).

The Committee also examined the reasons given by other institutions for changing from single-sex to coeducational status and "found that none of the motivating factors of the other institutions applied to the VMI mission." Pet. App. 214a. On the basis of these findings, the Committee recommended "that VMI should continue to adhere to its mission as an all-male institution." I DX 40 at 2 (I JA 1721; L. 196).

VMI also conducted a comprehensive self-examination "as part of its accreditation by the Southern Association of Colleges and Schools" in 1986. Pet. App. 173a, 213a. The Report of the Reaffirmation Committee of the Commission on Colleges for the Southern Association of Colleges and Schools specifically commended VMI for its

"'thorough'" review of its mission and purpose. Pet. App. 213a.

VMI's Board of Visitors ultimately decided to retain VMI's single-sex admissions policy. Pet. App. 173a, 214a. This decision was reached only after "reasoned and careful analysis" of the findings of the foregoing studies. *Id.* at 214a.

B. Initial Proceedings Below

1. The District Court's Liability Decision

The United States brought suit against Virginia and VMI in 1990, seeking admission of women to VMI. After trial, the district court found for cross-petitioners. Applying this Court's decision in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), the district court examined whether VMI's single-sex admissions policy "'serves important governmental objectives and [whether] the discriminatory means employed are substantially related to the achievement of those objectives.'" Pet. App. 165a. After "a fact-intensive examination of the practical considerations underlying the challenged policy," *id.* at 166a, the district court concluded that VMI's policy satisfied the requirements of *Hogan*.

Based on extensive expert testimony and academic studies, the court found that a "substantial body of 'exceedingly persuasive' evidence supports VMI's contention that some students, both male and female, benefit from attending a single-sex college." Pet. App. 168a; *see id.* at 167a-70a, 174a, 176a, 225a-27a. This finding was based on the testimony of renowned education experts, including Harvard University sociology professor David Riesman and Richard C. Richardson, Jr., Professor of Educational Leadership and Policy Studies at Arizona State University. Pet. App. 180-81a. As the court explained, that expert testimony demonstrated conclusively that "[f]or many men,

a single-sex college is optimal," because "[a]t an all-male college, adolescent males benefit from being able to focus exclusively on the work at hand, without the intrusion of any sexual tension." *Id.* at 225a.

The district court also found that VMI's adversative method in particular is beneficial to some adolescent males. Pet. App. 203a-06a, 223a-25a.[6] As Dr. Riesman testified, VMI's emphasis on absolute equality "reduces the inherited characteristics of students in terms of wealth, position, name, ethnicity, and race to the lowest common denominator," such that "there are no outsiders at VMI. Everyone is an insider. Everyone is on the same level." Riesman Dep. (I DX 60) at 41, 48 (I JA 177, 184). The VMI method infuses cadets with self-discipline and, as a consequence, "inculcates the value of orderliness, of dedication, . . . of honor, and integrity, of high seriousness, in which everything is serious." Riesman Dep. at 45 (I JA 181). In sharp contrast to society in general and many modern undergraduate institutions, VMI "requires that the student discipline himself, to endure pain, physical and psychological, to meet timetables," thereby ensuring that VMI cadets "emerge as self-disciplined people." Riesman Dep. at 50-51 (I JA 186-87).

The testimony of the other education experts was to the same effect. Clifton Conrad, the Government's expert, explained that VMI "is an institution that has a very powerful ethos, a compelling institutional culture," and it "has nourished and cherished, communicated what it is to so many people in a very, very powerful way." I Tr. 354.

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[6]These findings refer to the developmental characteristics of college-age students, and reflect the sensitive and sometimes difficult nature of the transition from late adolescence to adulthood that such students experience.

The VMI method envelops VMI cadets in "a kind of life, a holistic life, if you will, in which people[] are required to answer a number of obligations [and] . . . responsibilities almost at the same time. And through that kind of immersion in a closed system, they develop over a period of time . . . a certain ability to function effectively under conditions of stress and demands and challenge later on in life." I Tr. 992 (Bunting).

Based on the testimony of these experts, the district court concluded that "VMI has done a very good job of conveying its goals and its values, and has been successful in accomplishing those goals; specifically, instilling physical and mental discipline, character, and a kind of moral code." Pet. App. 204a. The district court further found that "key elements of the adversative VMI educational system . . . would be fundamentally altered, and the distinctive ends of the system would be thwarted, if VMI were . . . to make [the] changes necessary to accommodate" women students. *Id.* at 167a. Making VMI coeducational would require substantial changes to crucial aspects of VMI's educational method, including the rigorous physical training program[7] and the constant scrutiny and total lack of privacy in the barracks.[8] The fact

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[7]*See* Pet. App. 233a ("If women were admitted to VMI, it would be necessary to change certain physical training program courses and to set different standards. . . . Either [some aspects] would have to be abandoned, or there would have to be accommodations that would result in a dual track for women."); *id.* at 234a ("If VMI were coeducational and females were subjected to the same physical demands as male cadets, females would suffer on the order of 300% more injuries than males."); *id.* at 221a.

[8]Pet. App. 233a ("Adaptations would have to made in order to provide for individual privacy, for the sake of the men as well as for the sake of the women. . . . The introduction of privacy

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that these changes would occur "is well-founded in empirical evidence, and not based on an archaic stereotype." *Id.* at 171a.

The changes that would result if VMI became coeducational would necessarily lead to differential treatment of distinct groups of VMI students on the basis of gender, thereby contradicting VMI's core principle of absolute equality of treatment.[9] Moreover, coeducation "would produce cross-sex relationships among cadets that would significantly alter the character-building and leadership-development aspects of the VMI experience." Pet. App. 239a. As a result, VMI could not continue to utilize the same program if it were to become coeducational: "it would be impossible for a female to participate in the 'VMI experience,'" because "her introduction into the process would change it. Thus, the very experience she sought would no longer be available." *Id.* at 175a; *see also id.* at 176a, 227a.

On the basis of these findings, the district court concluded: (1) that the "virtually uncontradicted" evidence supports "Virginia's view that substantial educational benefits

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required by admission of women at VMI would contradict the principle that everyone is constantly subject to scrutiny by everyone else.").

[9]Pet. App. 237a ("The VMI experience is based on absolute equality, which is achieved through treating everyone in exactly the same way. . . . Given the actual physiological, psychological, and sociological differences between males and females, it would be impossible to treat everyone fairly by continuing to treat them the same if women were admitted to VMI. Equal treatment would necessarily give way to fair treatment, thus undermining egalitarianism.").

flow from a single-gender environment" and that those benefits "cannot be replicated in a coeducational setting," Pet. App. 176a; (2) that VMI's admissions policy "adds a measure of diversity to Virginia's overall system of education that would be missing if VMI were coeducational," and that this "diversity is further enhanced by VMI's unique method of instruction which was applauded by all of the educational experts who testified," *id.* at 176a; and (3) that VMI's admissions policy satisfies the requirements of *Hogan* because it is substantially related to the important state objectives of increasing educational diversity and providing the substantial educational benefits of single-sex education and the VMI method, *id.* at 173a, 176a-77a.

2. The Court of Appeals' Liability Decision

The court of appeals affirmed the district court's findings of fact. In particular, the court of appeals upheld the district court's findings that "VMI's unique methodology justifies a single-gender policy" and that "the record supports the conclusion that single-sex education is pedagogically justifiable, and VMI's system . . . even more so." *Id.* at 151a; *see id.* at 137a, 150a, 155a.

The court also affirmed the district court's findings "that VMI's mission can be accomplished only in a single-gender environment and that changes necessary to accommodate coeducation would tear at the fabric of VMI's unique methodology." Pet. App. 148a. The court explained that coeducation would require creation of "a dual track physical training program" which would, in turn, lead to perceptions of unequal treatment, jealousy, and resentment. *Id.* at 146a-47a. The total lack of privacy engendered by the barracks system would no longer be possible. *Id.* at 147a. And the VMI system would be unable to accommodate the cross-sex confrontation and harassment

that would necessarily occur if VMI attempted to maintain its adversative method in a coeducational setting. *Id.*[10] The court of appeals accordingly concluded that the admission of women to VMI "would deny those women the very opportunity they sought because the unique characteristics of VMI's program would be destroyed by coeducation." Pet. App. 148a.

Nonetheless, the court of appeals vacated the judgment of the district court, holding that VMI's policy of admitting only men was unconstitutional because the Commonwealth did not provide a justification for not offering a similar type of educational program exclusively to women. *Id.* at 151a-54a. The court remanded the case to permit the Commonwealth to formulate an acceptable remedy such as "establish[ing] parallel institutions or parallel programs." *Id.* at 156a. This Court denied a petition for a writ of certiorari by cross-petitioners seeking review of the court of appeals' liability determination. *VMI v. United States*, No. 92-1213.[11]

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[10]The court of appeals expressly rejected the Government's claim that this finding was based on stereotyping: "the evidence supported the district court's finding that cross-sexual confrontation and interaction introduces additional elements of stress and distraction which are not accommodated by VMI's methodology." Pet. App. 147a.

[11]On remand, after consultation with education experts, the Commonwealth reaffirmed its commitment to single-sex education and diversity in its higher education system. Accordingly, Virginia decided to establish a state-sponsored leadership education program for women. After careful study, Mary Baldwin College, a private, women-only college, created and implemented the VWIL program with funding and support from the Commonwealth and the VMI Foundation. Pet. App. 63a, 103a-04a. The district court found that VWIL is designed by professional educators to achieve for women the same objectives and outcomes that VMI achieves for men, and

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SUMMARY OF ARGUMENT

Under this Court's decision in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), a public school's single-sex admissions policy is constitutional if it "serves important governmental objectives" and is "substantially related to the achievement of those objectives." *Id.* at 724. This Court has recognized that providing diverse educational opportunities is one of the most important objectives of state and local governments. The record in this case conclusively establishes that, as an alternative to a full range of coeducational offerings, single-sex education provides important educational benefits to students who choose it at the elementary, secondary, and undergraduate levels.

Virginia has a long history of support for single-sex education for men and women. Not only does Virginia provide the benefits of single-sex education at VMI, but through a variety of means, including the state's Tuition Assistance Grant Program, Virginia has historically provided substantial financial assistance to students (primarily women) who attend private single-sex colleges in the Commonwealth. Virginia is likewise committed to single-sex education at the elementary and secondary school level. Indeed, the Virginia General Assembly recently authorized local school boards to offer single-sex classes in the state's public schools. *See* Va. Code § 22.1-212.1:1. The existence of single-sex programs necessarily enhances

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accordingly concluded that the mandate of the court of appeals had been satisfied. *Id.* at 53a-131a. The court of appeals affirmed. *Id.* at 1a-52a. Cross-petitioners will address the remedial issues in their brief as respondents in No. 94-1941.

educational diversity in the Commonwealth and provides an educational option that is exceedingly beneficial to some young people.

The record also establishes beyond dispute that VMI provides additional educational benefits to its male students by virtue of its adversative method of education. The meticulous record and comprehensive findings in both courts below establish that the benefits of that method, like the benefits of single-sex education generally, can be attained only in a single-sex environment. In short, requiring VMI to become coeducational would deny the benefits of single-sex education *and* the VMI method to VMI's students without extending those benefits to anyone else.

The court of appeals nonetheless held that a State can provide single-sex education to students of one gender only in the context of a comparable single-sex program for students of the other gender, regardless of student needs and preferences, the professional judgment of educators, or available public resources. This formulaic analysis is erroneous as a matter of constitutional law and educational policy, and it sets a troublesome precedent that, unless reversed by this Court, will stifle experimentation with single-sex education by state and local governments nationwide.

The court of appeals' decision misapplies this Court's decision in *Hogan*. The Court's opinion in that case conducts a detailed factual analysis of the justification for the single-sex admissions policy at a state nursing school for women. The Court's opinion attached *no* constitutional significance to the absence of an all-male nursing school. *Id.* at 720 n.1. Instead, the Court found the single-sex admission policy unconstitutional because, among other things, that policy was based on the "mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women," and was not "necessary to reach any

of [the school's] educational goals," since the school already permitted men to attend classes and thus could not claim to provide the benefits of single-sex education. *Id.* at 726, 731.

In sharp contrast, VMI's single-sex admissions policy is based on sound and well-established pedagogical principles and firmly rooted in fact. And it is directly and substantially related to achieving the important and legitimate benefits of educational diversity, including single-sex education and the VMI method, in a context in which ample single-sex educational opportunities are available for women with public financial assistance, and where a publicly financed coeducational military program already exists. The court of appeals departed from *Hogan* by failing to recognize that these features of Virginia's policies and educational system demonstrate conclusively that Virginia readily satisfies the *Hogan* test.

Instead, the court of appeals erroneously imposed an additional requirement that a State offering a single-sex educational program for members of one gender must provide a comparable program for the other gender as a matter of course. This additional requirement places public educational policy in a constitutional straitjacket and will inhibit States and their political subdivisions from responding to heterogeneous and changing student needs and preferences. For example, the court of appeals' analysis effectively precludes school districts from offering single-sex programs for inner-city youths even though research shows that they are greatly at risk and might benefit from single-sex education options.

Requiring States to offer two single-sex programs in order to justify the continued existence of one program of proven excellence produces only a superficial and formalistic equality while sacrificing the ability of professional educators to respond in the most effective and flexible ways

to the challenge of education in the real world. Under the court of appeals' reasoning, the single-sex programs at schools like VMI and VWIL would become unconstitutional as soon as one or the other ceased to operate or became coeducational because of the needs, interests, or desires of the students attending that school, or because there was an excess of private-sector alternatives for the members of one gender or the other.

The constitutionality of one single-sex program should not turn on the ebb and flow of student interest in or demand for another single-sex program. A State should not be forced to choose between terminating a successful program and wasting scarce resources to sustain an unwanted and perhaps unnecessary parallel facility for students of the opposite gender.[12] Nor should States face endless constitutional litigation over the comparability of parallel programs.

Viewed independently, single-sex programs like the one at VMI (and at VWIL) pass constitutional muster under *Hogan*. That is all the Constitution requires. The court of appeals erred in requiring more.

ARGUMENT

I. PUBLICLY SPONSORED SINGLE-SEX EDUCATIONAL PROGRAMS ARE CONSTITUTIONALLY PERMISSIBLE IF THEY ARE SUBSTANTIALLY RELATED TO THE ACHIEVEMENT OF AN IMPORTANT GOVERNMENTAL OBJECTIVE

In *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), this Court applied intermediate scrutiny in review-

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[12]In voicing these concerns, cross-petitioners are looking beyond the immediate case involving VMI and VWIL, both of which are valuable and desirable.

ing an equal protection challenge to a public university's policy of admitting only members of one gender to a particular educational program. Under the two-pronged test standard applied by the Court in *Hogan*, a gender-based classification is permissible if (1) "the classification serves 'important governmental objectives'" and (2) "'the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" 458 U.S. at 724.

As the Solicitor General has acknowledged (94-1941 Pet. 19; 94-2107 Br. in Opp. 5 & n.2), the constitutionality of Virginia's single-sex educational programs must be judged under the *Hogan* standard. Accordingly, the question for decision here is whether VMI's single-sex admissions policy is substantially related to the achievement of an important government objective.

II. VMI'S SINGLE-SEX ADMISSIONS POLICY ADVANCES IMPORTANT GOVERNMENTAL OBJECTIVES

A. Providing The Benefits Of Single-Sex College Education And Accomplishing The Objectives Attainable Under The VMI Method Are Important Governmental Objectives

There can be no doubt that providing diverse and pedagogically beneficial opportunities at all educational levels constitutes a legitimate and important governmental objective. "Public education, like the police function, 'fulfills a most fundamental obligation of government to its constituency,'" and "'education is perhaps the most important function of state and local governments.'" *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). As this Court explained in *Norwood v. Harrison*, 413 U.S. 455, 462-63 (1973), government has a "special interest in elevating the quality of education in both public and private schools."

Individuals differ widely in the means by which they may be most effectively stimulated and educated. Therefore, diversity in educational approaches is a legitimate and important goal for government agencies seeking to maximize educational benefits for their citizens. Indeed, as this Court has recognized, "[n]o area of social concern stands to profit more from a multipiicity of viewpoints and from a diversity of approaches than does public education." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 50 (1973); *accord Committee for Public Educ. v. Nyquist*, 413 U.S. 756, 773 (1973) ("We do not doubt -- indeed, we fully recognize -- the validity of the State's interests in promoting pluralism and diversity among its public and nonpublic schools."). And, this Court has also recognized that "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were actually alike." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

It is equally important to vest educators with the freedom to choose among educational alternatives and to use flexible approaches in responding to student needs. Educators must be given latitude to learn from experimentation and to evolve programs to meet student needs. In the primary and secondary school context, for example, "local autonomy has long been thought essential . . . to the quality of the educational process," *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974), and the same is true in higher education. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) ("'To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.'"); *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the judgment) (a university must be free to "'determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study'").

Single-sex educational programs provide a materially more effective learning environment for significant numbers of students and complement the diversity and educational benefits offered by a State's primarily coeducational system of higher education. Thus, the governmental objective of providing such programs is unquestionably legitimate and important. The record and findings in this case conclusively demonstrate that single-sex education and the VMI method provide meaningful and pedagogically valid educational benefits to the students who choose to attend VMI.

The district court found, based on extensive expert testimony and empirical studies, that for some students, "the opportunity to attend a single-sex college is a valuable one, likely to lead to better academic and professional achievement." Pet. App. 168a. In particular, "[f]or many men, a single-sex college is optimal." *Id.* at 225a (citing Riesman Dep. 39). The court of appeals agreed that the effects on both genders of single-sex education "is almost uniformly positive." *Id.* at 149a. This finding was "amply" supported by the testimony of the nation's leading experts, as well as extensive scholarly research. *Id.* at 149a.

In fact, the Government's education expert agreed with this proposition as well. Dr. Conrad testified that "I'm a believer in single sex education, it has great virtues in lots of ways for lots of people, under lots of conditions." I Tr. 373 (I JA 621). The court of appeals added that single-sex education also had "salutary consequences for sexual equality in the job market" and that students in single-sex colleges "were more likely to set aside initial, stereotypical job aspirations." Pet. App. 149a. Thus, single-sex education performs a valuable service in uprooting inaccurate stereotypes. "The experts for both sides in this case" agreed with these conclusions. *Id.* at 150a.

In addition to the conceded benefits of single-sex

education in general, VMI's methodology has proven to be particularly beneficial to the adolescent male students it attracts. The district court found that VMI "has been successful in . . . instilling physical and mental discipline, character, and a kind of moral code" in its students. Pet. App. 204a. "The VMI experience promotes the development of qualities" such as "[s]elf control, self discipline, and the belief that you must subordinate your own personal desires and well-being to the good of the whole unit." Pet. App. 206a, 207a. VMI "takes students [who] are average from an academic perspective, and through the character development program, graduates people who have more than average commitment and motivation as well as character." *Id.* at 206a.

The court of appeals twice affirmed the district court's extensive factual findings regarding the demonstrable and substantial benefits of single-sex education generally and the VMI method in particular. As the court of appeals explained, the "record supports the conclusion that single-sex education is pedagogically justifiable, and VMI's system . . . even more so." Pet. App. 151a. Based upon the extensive record, including testimony by the Nation's leading experts, the court declared: "[t]hat single-gender education at the college level is beneficial to both sexes is a fact established in this case." *Id.* at 20a.

As the foregoing discussion demonstrates, it is common ground in this case that single-sex college education provides unique educational benefits for some college-age students, and that the VMI method provides additional educational benefits for certain students. The expert testimony at trial, the district court's findings, and the court of appeals' affirmance of those findings foreclose any challenge to those propositions at this stage of the case. It necessarily follows that Virginia's commitment to providing these benefits to its citizens is a valid and important govern-

mental objective.

B. Virginia Has Thoughtfully, Reasonably, And Carefully Structured And Implemented Its Decision To Provide Its Citizens With The Benefits Of Single-Sex Education And The VMI Method

The Commonwealth of Virginia has thoughtfully and reasonably chosen to provide the benefits of single-sex education and the VMI method as components of its diverse system of higher education. The district court found that "[t]he Commonwealth of Virginia has an avowed policy of offering a diversity of choices in higher education." Pet. App. 81a. The Virginia General Assembly and the State Council of Higher Education for Virginia have consistently reaffirmed the importance of maintaining that diversity.[13]

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[13]The State Council's biennial plans have repeatedly emphasized the importance of diversity in educational methodology, curriculum, and techniques in higher education. *See, e.g.*, I DX 24 at 23 ("Virginia's special programs to emphasize institutional initiative and experimentation continue to attract national attention"); I DX 26 at 7 ("The goals of Virginia's state-supported system of higher education have been set and remain unchanged. The strategies for achieving those goals through a multi-tiered, highly diverse set of institutions which offers access to virtually every kind of higher educational program and service, are in place"); I DX 28 at 6 ("There is probably no state in the union with independent and state-supported colleges and universities as diverse, and as excellent as Virginia's. . . . The [State] Council urges support of a coordinated system of colleges and universities so that the strength of diversity is complemented by that of carefully coordinated system-wide planning. The Council also urges renewed support of the tradition of college and university autonomy which is a hallmark of Virginia higher education."); I DX 30 at 12, 17 (including within Virginia's "Goals for Higher Education" the intention "to protect and enhance the institutional diversity which exists within Virginia's system of higher education" and "to guarantee the essential autonomy

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As the Council has explained, "Virginia has always recognized that there are many kinds of excellence and has supported a diversity of missions among its institutions of higher education." Stips. 38 (I JA 83; L. 65). Similarly, the 1990 Report to the Governor and General Assembly of the Commission on the University of the 21st Century "urge[s] that the hallmarks of Virginia higher education -- autonomy and diversity -- be maintained in the future." I DX 7 at 36 (I JA 1479). The Virginia Constitution itself contains "'an implicit endorsement of the principle of pluralism in higher education'" by authorizing public financial support for private colleges and universities. Stips. 28 (I JA 73; L. 55).

One of the means by which the Commonwealth has pursued its policy of diversity in higher education is through the authority granted to the governing boards of the several component institutions. The State Council of Higher Education believes as a policy matter that "responsibility to execute general state policy . . . should be decentralized to the greatest extent possible," II DX 16 at 12 (1991 Plan), so that individual creativity and experimentation will be encouraged.[14] In keeping with that policy, the Virginia General Assembly has delegated to each institution responsibility to determine policies of central importance to its respective mission and programs,

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and character of each institution"); *id.* at 6, 8, 45-46; Stips. 37-38 (I JA 82-83; L. 64-65).

[14] *Accord* I DX 30 at 45 ("Institutions will exhibit greater imagination and capability in dealing with their special opportunities and problems when a maximum of authority consistent with system-wide goals and priorities is vested at the institutional level.").

including admissions policies. *See* Va. Code § 23-9.6:1(2); L. 356. As a result, "'[t]he formal system of higher education in Virginia includes a great array of institutions,'" including "'state-supported and independent,'" "'research and highly specialized,'" and "'single-sex'" schools. Stips. 37-38 (I JA 82-83; L. 64-65) (quoting 1990 Report).

As explained above, several of Virginia's public colleges and universities originally offered single-sex education for women. Pet. App. 175a n.10, 185a-87a. In recent years, however, these institutions decided to become coeducational because of the popular trend in favor of coeducation and the financial pressures caused by that trend. II Tr. 642, 660; *see also* Reisman Dep. 37-39, 76-77 (I JA 173-75, 212-13). Thus, Virginia was without public single-sex higher education for women for the period between 1972 and 1995, an historical anomaly that has disappeared with the creation of VWIL.

Like the governing boards of the other public institutions of higher education in Virginia, VMI's Board of Visitors exercises authority to determine its admissions policy, subject to the General Assembly's ultimate authority to change that policy if it so chooses. Va. Code §§ 23-92, -104. After careful consideration of VMI's admissions policy during the 1980's, VMI's Board of Visitors decided to retain VMI's single-sex admissions policy. As the district court explained, this decision was based on the absence of significant interest among women for access to the VMI method and on the fact that turning VMI into a coeducational institution would irrevocably change VMI's unique mission and program and end its ability to provide students the benefits the VMI system was designed and developed to afford. Pet. App. 212a-14a. Thus, as the district court found, VMI's single-sex admissions policy "has been continued only after reasoned and careful

analysis by the Board of Visitors," the body authorized by the Commonwealth to determine VMI's admissions policy. *Id.* at 214a.

In its original ruling on liability, the court of appeals concluded that the Commonwealth had failed to point to "a stated policy justifying single-sex education in state-supported colleges and universities." Pet. App. 153a.[15] In so holding, the court of appeals appears to have presumed that a governmental objective supporting a gender-based classification can be considered by the courts only if it has been explicitly articulated by the state legislature itself. *Id.*

The court of appeals plainly erred in declining to treat VMI's reasoned decision to retain single-sex education as a component of a larger state policy. Even in cases involving challenges to *racial* classifications subject to *strict* scrutiny,

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[15]The court of appeals also pointed to a suggestion by Virginia's then-Attorney General to the effect that then-Governor Wilder had expressed "personal" reservations about VMI's admissions policy. Pet. App. 142a, 153a. Under Virginia law, however, neither the Governor nor the Attorney General has any authority to determine state policy with respect to the composition of VMI's student body. Rather, as the Commonwealth explained in its answer to the complaint filed by the United States in this case, "[t]he admissions policy of VMI is the exclusive province of the VMI Board of Visitors, subject only to the Virginia General Assembly as provided by law." Answer, ¶ 6 (I JA 29; L. 2). Moreover, then-Governor Wilder later made clear his support for both VMI and VWIL, and the current Governor, Lieutenant Governor, Attorney General, and General Assembly are fully supportive of VMI's (and VWIL's) single-sex admissions policies as part of Virginia's broad-based higher education system. *See, e.g.*, II DX 1-3, 5, 6, 11L, 11M, 11R (II JA 113-23, 125-26, 165-68, 181-84; L. 289-96, 323-26); *see also* Pet. App. 81a n.20 (then-Governor Wilder's "position in this Court has always been one supporting VMI's all male admissions policy").

this Court has consistently given full consideration to the justifications proffered by a State's political subdivisions, without suggesting that such justifications are *per se* invalid absent explicit endorsement from or articulation by the state legislature. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (opinion of O'Connor, J.); *id.* at 498-505 (opinion of the Court); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-78 (1986) (opinion of Powell, J.); *id.* at 287-89 (opinion of O'Connor, J.); *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 311-14 (1978) (opinion of Powell, J.). It follows *a fortiori* that a State's political subdivision may, in the exercise of the powers delegated to it by the state legislature, and consistent with established state policies, choose the means by which to implement important and legitimate governmental objectives. VMI's decision to pursue the benefits of single-sex education and the VMI method is therefore entitled to consideration as an element of a larger important governmental objective, and the court of appeals' ruling to the contrary is incorrect.

As the district court correctly observed, "[t]he record in this case shows the Commonwealth's unambiguous and unequivocal support of single-sex education," and "the Commonwealth's position in this Court has always been supportive of VMI's all-male admissions policy because it adds to the diversity of choices in Virginia's higher education system." Pet. App. 81a. Thus, the Commonwealth (acting through the State Council of Higher Education and the governing boards of each of its colleges, including the VMI Board of Visitors) has chosen to pursue the legitimate governmental goals of providing diverse educational opportunities and the benefits of single-sex education and the VMI method. The first prong of the *Hogan* test is therefore satisfied, and the only remaining question is whether VMI's admissions policy is substantially related to the achievement of these important governmental objec-

tives.

III. VMI'S SINGLE-SEX ADMISSIONS POLICY IS SUBSTANTIALLY RELATED TO ACHIEVING THE IMPORTANT GOVERNMENTAL OBJECTIVES OF PROVIDING THE BENEFITS OF A SINGLE-SEX COLLEGE EDUCATION AND THE VMI METHOD AND ENHANCING DIVERSITY IN HIGHER EDUCATION

As the district court found, "VMI contributes to the diversity of Virginia's higher education in two related ways: (1) by providing an opportunity for single-sex education, and (2) through the unique VMI method of character development and leadership training." Pet. App. 188a. Both of these contributions to the breadth of Virginia's higher education system would be lost if VMI were to become coeducational.

It is self-evident that VMI's policy of limiting admission to men is substantially related to achieving the proven, positive, factually established benefits of single-sex education and the VMI method. Requiring VMI to become coeducational would, by definition, preclude it from providing a single-sex education, thus depriving VMI's students of the benefits provided by such an education without extending those benefits to anyone. As the court of appeals observed, "the only way to realize the benefits of homogeneity of gender is to limit admission to one gender." Pet. App. 22a.[16] Changing VMI's admissions policy would, therefore, entirely frustrate one of Virginia's legitimate and important educational goals by depriving students of an opportunity to learn in a single-sex

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[16]That fact serves to distinguish this case from *Hogan*, in which the record was "flatly inconsistent with the claim that excluding men from the School of Nursing is necessary to reach any of [the State's] educational goals." 458 U.S. at 731.

environment.

Moreover, as both courts below found, women could not be admitted to VMI without eliminating the very aspects of its program that distinguish it from VPI and other institutions of higher education in Virginia. Pet. App. 6a-7a, 24a-25a, 146a-48a, 170a-73a, 227a, 233a-34a, 237a-39a. Even the Government concedes that coeducation would require substantial changes to VMI's method, including the introduction of dual-track physical education activities for women so as "to reflect the comparable effort of each gender," the creation of privacy rights on the basis of gender, and the elimination of "harassment" deemed inappropriate in a cross-gender context. II JA 99-103, 107-08. The Solicitor General disputes the extent and impact of those changes, but that factual issue was resolved against the Government by both courts below.

The evidence and findings at trial demonstrate that VMI's adversative method would necessarily have to undergo drastic modification if VMI were to become coeducational. As the district court explained, for example, the Marine Corps found that it was unable to maintain the harsh regimen of its boot camps -- which are similar in intensity to VMI's first-year indoctrination -- in a coeducational setting. Pet. App. 195a, 235a. Similarly, West Point modified and then abandoned the adversative model altogether after women were admitted, and it also rejected fixed physical training standards in favor of "comparable" training. Pet. App. 235a-241a. However effective the West Point system may now be in achieving the goals it serves, it cannot accomplish the same results as VMI, which uses different methods to stimulate and educate different types of individuals.

Thus, both courts below were plainly "justified in finding that if women were to be admitted, VMI would have to convert to a dual-track physical training program in order

to subject women to a program equal in effect to that of men." Pet. App. 146a. The result of this departure from VMI's core policy of egalitarianism would be to create perceptions of unequal treatment among cadets, leading to tensions and disparities in treatment that would be incompatible with VMI's educational method. *Id.* at 146a-47a.

In addition, the admission of women to VMI would necessarily entail creation of privacy rights for cadets, at least on gender grounds. Pet. App. 147a. This change would contradict the adversative method's emphasis on complete equality, absence of privacy, and close scrutiny by all other cadets.

Moreover, related aspects of the adversative method would necessarily undergo substantial modifications with the admission of women, because the harassment, scrutiny, and pressure that upperclass students impose on their juniors would undoubtedly "play out differently" when the pressure is imposed by a late adolescent male on a late adolescent female or vice versa. Pet. App. 147a. This "cross-sexual confrontation and interaction" would "introduc[e] additional elements of stress and distraction which are not accommodated by VMI's methodology" and would "significantly alter the character-building and leadership-development aspects of the VMI experience." Pet. App. 147a, 239a.

In short, the fundamental characteristics of VMI's educational method, including the adversative system, the total absence of privacy, and the strict egalitarianism that pervades all aspects of the program, would undergo radical change or disappear altogether with coeducation. It is simply "without a doubt that VMI's present methods of training and education would have to be changed as West Point's were." Pet. App. 172a n.8. As a consequence, the women admitted to VMI would be denied "the very opportunity they sought because the unique characteristics

of VMI's program would be destroyed by coeducation." Pet. App. 6a-7a. Indeed, as the district court observed, "if VMI were to admit women, it would become more similar to the military barracks at VPI, so its uniqueness would be lost." Pet. App. 173a. Thus, one of the experts explained after studying the educational options available in Virginia, "[t]ransforming VMI into a coeducational institution would significantly reduce the postsecondary educational choices available to men without materially altering the range of choices available to women." I DX 58 at 25 (I JA 1757).

The simple truth is that "VMI's mission can be accomplished only in a single-gender environment," Pet. App. 148a, and VMI's students respond most effectively to the VMI method. As a result, "[t]he classification for single-gender education at VMI is . . . directly related to achieving the results of an adversative method in a military environment," because "'the unique characteristics of VMI's program would be destroyed by coeducation.'" Pet. App. 6a-7a, 23a; *see also id.* at 146a-48a, 167a, 175a-76a. Thus, VMI's single-sex admissions policy is precisely tailored to the achievement of the Commonwealth's legitimate objectives, and the second prong of the *Hogan* test is satisfied in this case.

IV. THE EQUAL PROTECTION CLAUSE DOES NOT REQUIRE STATES TO OFFER PARALLEL SINGLE-SEX EDUCATIONAL OPPORTUNITIES TO MEMBERS OF EACH GENDER WITHOUT REGARD TO STUDENT INTEREST OR THE EXISTENCE OF OTHER PUBLIC AND PRIVATE EDUCATIONAL OPPORTUNITIES

A. The *Hogan* Test Is Satisfied By The Commonwealth's Showing That VMI's Single-Sex Admissions Policy Is Substantially Related To The Achievement Of Important Governmental Objectives

For the reasons set forth above, VMI's single-sex admis-

sions policy satisfies the two-pronged test enunciated in this Court's decision in *Hogan*. The court of appeals reached its contrary conclusion only by engrafting a third requirement onto the *Hogan* test, precluding States from offering any particular single-sex educational opportunity for members of one gender without proffering a justification for the absence of a "parallel" or "substantively comparable" program for members of the opposite gender. Pet. App. 17a, 155a. That holding goes beyond *Hogan*, which made clear that a State *may* "confer a benefit only upon one class" as long as the "classification is substantially related to achieving a legitimate and substantial goal," *i.e.*, as long as the two prongs of the *Hogan* test are satisfied. 458 U.S. at 724, 731 n.17.

In *Hogan*, of course, the State could not meet this requirement because, as a factual matter, the State's asserted goal was not "the actual purpose underlying the discriminatory classification" and because the single-sex admissions policy was *not* "necessary to reach any of [the university's] educational goals." 458 U.S. at 730, 731. The "uncontroverted record" in *Hogan* revealed "that admitting men to nursing classes [did] not affect teaching style" or "the performance of the female nursing students." *Id.* at 731. Indeed, as the Court explained, men were already permitted to attend and "participate fully in classes" at the university, so the single-sex admissions policy could not be defended on the ground that it was substantially related to achieving the benefits of single-sex education. *Id.*

In this case, by contrast, as explored thoroughly by the courts below, the record conclusively demonstrates that VMI's single-sex admissions policy *is* substantially related to (and indeed absolutely necessary to) the Commonwealth's actual and important goals of providing the enhanced diversity and distinct benefits of single-sex educa-

tion and the VMI method. Those goals would be frustrated, and the important advantages of VMI's single-sex educational method would be lost, if VMI were to become coeducational. VMI's single-sex admissions policy *is* "necessary to reach . . . [VMI's] educational goals," 458 U.S. at 731, and *Hogan* therefore requires rejection of the court of appeals' liability determination.

The invalidity of the court of appeals' liability determination is also evident from the mode of analysis followed by the Court in *Hogan*. The *Hogan* Court conducted a careful and detailed analysis of the proffered state objective and the relationship between that objective and the challenged classification. *See* 458 U.S. at 727-31. That analysis would have been wholly superfluous, however, if the absence of any state-provided single-sex educational opportunity for the excluded gender was *itself* sufficient to render the challenged admissions policy unconstitutional. Under the approach followed by the court of appeals in this case, the opinion in *Hogan* could have ended with its first footnote, which observed that "Mississippi maintains no other single-sex public university or college." *Id.* at 720 n.1. That the *Hogan* Court instead evaluated the legitimacy of the challenged single-sex admissions policy *without regard to the absence of an analogous single-sex program for members of the excluded gender* demonstrates the fallacy of the court of appeals' approach to the liability issue here.[17]

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[17]It is clear that the *Hogan* Court's refusal to require dual single-sex programs was not a mere oversight. Indeed, the court of appeals' opinion in *Hogan* had relied on that very reasoning, holding that "the fact that the state does not maintain a corresponding all-male nursing school deprives it of law as well as logic to support its argument that it is not discriminating between, or that it is affording equal protection to, the sexes." *Hogan v. Mississippi Univ. for Women*, 646 F.2d 1116, 1119 (5th Cir. 1981). Given that explicit statement

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If left uncorrected, the effect of the court of appeals' new test for liability will be to preclude States from offering the option of single-sex education to students of one gender unless a "substantively comparable" single-sex educational opportunity is offered to students of the other gender, regardless of the need or demand for such a program or the other educational opportunities available to that gender. Such a blow to single-sex education could well be devastating, doubly so because it would come at a time when educators and policymakers are turning more and more frequently to single-sex education as one solution for some of the ills that beset the Nation's public education system.

In Detroit, for example, the public school system sought to create all-male academies to respond to the special needs of inner-city boys, who consistently scored lower on standardized reading and math tests and had far more disciplinary problems than girls. *See* Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?*, 105 Harv. L. Rev. 1741, 1743 (1992). That approach was supported by the findings of multiple educational researchers who have documented the benefits of single-sex education at the primary and secondary school levels as well as in college, and offered exciting possibilities for improving the dire status of public education in the inner cities.[18] Applying logic similar to that

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in the Fifth Circuit's opinion, this Court's refusal to adopt that reasoning in *Hogan* is highly significant.

[18]*See* Mikyong Kim & Rodolfo Alvarez, *Women-Only Colleges: Some Unanticipated Consequences*, 66 J. HIGHER EDUC. 640, 661-62 (Nov./Dec. 1995); Richard Hawley, *A Case For Boys' Schools*, *in* SINGLE-SEX SCHOOLING: PROPONENTS SPEAK, A SPECIAL REPORT FROM THE OFFICE OF EDUCATIONAL

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used by the court of appeals in this case, however, a federal district court judge preliminarily enjoined the academies on the ground that they discriminated against girls, and the school district dropped the program rather than expend its scarce resources on costly litigation. *See Garrett v. Board of Educ.*, 775 F. Supp. 1004 (E.D. Mich. 1991).

Despite the fate of the Detroit experiment, school districts in Maine, California, Maryland, and other locations across the nation are seeking to take advantage of the special benefits offered by single-sex education for some students and in some contexts.[19] Indeed, as part of its commitment

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RESEARCH & IMPROVEMENT, U.S. DEP'T OF EDUC. (Debra Hollinger & Rebecca Adamson, eds.) (hereinafter "DOE REPORT") 11, 11 (1992); Cornelius Riordan, *The Case For Single-Sex Schools, in* DOE REPORT 47, 48; Valerie E. Lee & Anthony S. Bryk, *Effects of Single-Sex Secondary Schools on Student Achievement and Attitudes*, 78 J. EDUC. PSYCH. 381, 393-94 (1986).

[19] *See, e.g.*, AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., GROWING SMART: WHAT'S WORKING FOR GIRLS IN SCHOOL, EXECUTIVE SUMMARY AND ACTION GUIDE at 10 (1995) (classes separating girls and boys are now used in Virginia, New Hampshire, Illinois, New York, and California); Eric Wee, *A Lesson in Confidence: Va. Middle School Tries All-Girl Classes*, WASH. POST, May 1, 1995, at A1 (discussing all-girl classes in Manassas, Virginia; Ventura, California; and at Presque Isle High School in northern Maine); Ron Russell & John Wilson, *32 Girls + Science = Success*, DET. NEWS, July 18, 1995, at D1 (girls-only ninth grade physical science classes in Michigan public school); *Single-Sex Math Class Gaining In Popularity*, PHOENIX GAZETTE, Nov. 5, 1994, at A18 (Portsmouth, New Hampshire, school board initiating separate high school classes for boys and girls); Tim Poor, *Schools Try Same-Sex Classrooms*, ST. LOUIS POST-DISPATCH, Aug. 7, 1994, at 1A (boys and girls in grades 1-5

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to single-sex education, Virginia's General Assembly recently enacted a statute authorizing local school boards to offer single-sex classes in the Commonwealth's public schools. *See* Va. Code § 22.1-212.1:1. School districts have already responded by seeking to use single-sex classes in areas where educators believe they may be most beneficial. For example, Virginia's Prince William County is experimenting with all-girl math classes in order to increase the success rate, skills, confidence, and number of female math students.[20] These creative and laudable efforts to improve public education and respond to individualized and varied needs could well be precluded or hindered under the court of appeals' logic, with the result that the benefits of single-sex education will be limited to those relatively few students whose parents are able and willing to afford a private school education.

Likewise, the liability ruling below would preclude Virginia or any other State from offering a program like VWIL in the absence of a parallel single-sex program for men, even if there were a strong basis in fact for believing that the need and demand for a VWIL-like program was far greater than that for an analogous program for men. Indeed, under this Court's decision in *Norwood v. Harrison*, 413 U.S. 455 (1973), the state and federal governments could even be barred from providing financial or other assistance to women students attending *private* single-sex institutions, at least in the absence of proof that the private single-sex opportunities available to each gender were "substantively comparable." Such proof would be

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have separate classes in Baltimore, Maryland public school).

[20]*See* Wee, *supra* note 19, at A1.

virtually impossible to obtain in most States, given that there are only a handful of private men's colleges in the entire country.[21]

Finally, the reasoning of the court below will surely inhibit any State program, whether educational or not, that focuses on the particular needs of men or women. For example, a program designed to address the effects of domestic violence or pornography on women would be suspect in the absence of a comparable program for men, even if the available evidence clearly demonstrated that these effects are generally quite different for men and women. Battered women's shelters and other programs could be rendered unconstitutional in the absence of parallel programs for the opposite gender, even in the absence of any substantial need for such parallel programs. And even if the public resources could be found to fund these parallel programs, there would be no way to avoid constant litigation and judicial scrutiny regarding the comparability of the benefits being afforded to each gender.

For all these reasons, the court of appeals' liability determination is wrong under *Hogan* and will yield highly unfortunate consequences if it is allowed to stand. This Court should therefore reject the ruling on liability below.

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[21]At the time of the liability trial, there were five private men's colleges in the United States: Morehouse College, Rose-Hulman Institute of Technology, Hampden-Sydney College, Wabash College, and Deep Spring College (a two-year college). Stips. 44 (I JA 89; L. 71). Rose-Hulman became coeducational this year.

B. The Equal Protection Clause Does Not Require Creation Of Parallel Single-Sex Programs In The Absence Of Significant Demand Where The Overall Educational Opportunities Available To Each Gender Are Equivalent

Even if *Hogan* could be read to require justification for the absence of a parallel program for the gender not afforded access to a single-sex program, that burden was satisfied in this case. The courts below found that a separate women's program identical to VMI would be both pedagogically and financially impracticable because relatively few women would be interested in such a program. Pet. App. 27a, 73a, 75a. This fact, together with the extensive and diverse educational opportunities for women in Virginia and the prominence of female students in both publicly supported colleges and in private single-sex colleges in Virginia, satisfies any concern over whether educational resources are being deployed fairly and equitably in the Commonwealth.

Based on West Point's experience in recruiting for its non-adversative, coeducational program, the district court concluded (Pet. App. 174a) that "some women" might want to attend a *coeducational* VMI (with the modifications to the educational program entailed by coeducation). The court made no such finding, however, with respect to a single-sex adversative program for women adhering to the VMI model. To the contrary, the district court found that the evidence demonstrates little, if any, meaningful demand for such a program. *See* Pet. App. 73a, 75a & n.12.[22]

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[22]For example, Dr. Richard C. Richardson, an expert in higher education and the development of educational programs who chaired the most recent accreditation team for West Point, testified that, based on his interviews with female VPI cadets and on West Point's experience with female applicants, the

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Indeed, although there have been numerous women's colleges in the United States, there has never been *any* type of all-female military college in this country, let alone a women's military college based on the adversative model. Stips. 44 (I JA 89; L. 71). In fact, the record establishes that there is relatively little demand among women even for *non*-adversative residential ROTC programs in a military setting. In 1990, for example, only 44 women participated in VPI's coeducational Corps of Cadets, a tiny fraction of the more than 93,000 women college students in Virginia; fewer than 250 women were enrolled in residential ROTC military programs in the entire Nation. I DX 62L (I JA 1788; L. 233); *see also* II DX 88 (II JA 274; L. 344).

The court of appeals also concluded that the Government did not rebut cross-petitioners' showing that "if the state were to establish a women's VMI-type program, the program would attract an insufficient number of participants to make the program work." Pet. App. 27a. In the absence of meaningful demand, it would be pointless to insist that VMI be permitted to exist only if the State could show that a virtually identical program existed for women. As this Court observed in *Rostker v. Goldberg*, 453 U.S. 57, 79 (1981), the Constitution does not require government to "engage in gestures of superficial equality." Rather, it requires only that government "treat similarly situated persons similarly." Women and men -- because of

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number of women students interested in a mirror-image VMI program "over a three or four-year period . . . could not possibly exceed 25 to 30 students." II Tr. 606, 613-15 (II JA 736, 742-44). With an institution of that size, of course, duplication of the VMI experience "was simply not possible." II Tr. 615 (II JA 745).

the vastly different extent to which they seek a VMI-like educational experience as opposed to other educational options -- are simply not "similarly situated" with respect to that type of education.

The Commonwealth's policy of providing single-sex college education and the VMI method for VMI's male students must also be evaluated in the context of the range of educational opportunities and public financial assistance afforded to women in Virginia's higher education system. A wide array of educational opportunities are available to women at Virginia's 14 coeducational public undergraduate institutions, including the opportunity to obtain degrees in all of the subjects offered at VMI (and more), and to participate in a coeducational residential Corps of Cadets and ROTC program at VPI. Indeed, substantially more women than men enjoy the benefits of the Commonwealth's public system of higher education. Pet. App. 187a.[23]

Moreover, analysis of the educational opportunities for women in Virginia would be incomplete without consideration of private colleges and universities that receive some form of direct or indirect assistance from Virginia. The Commonwealth's policy is that "'[h]igher education resources should be viewed as a whole -- public and private,'" and "Virginia relies on its independent institutions [of higher education] to offer students choices and meet the educational needs of people in the Commonwealth." Pet.

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[23]According to recent data published by the U.S. Department of Education, 83,395 women and 74,918 men were enrolled as full-time students in Virginia's public institutions of higher education in the Fall of 1991; the corresponding numbers for part-time students were 81,745 women and 58,049 men. *See* U.S. DEP'T OF EDUC., NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS 195 (1994). Preliminary data reveal similar results for 1992. *Id.*

App. 191a; *see* Stips. 26, 28-32 (I JA 71, 73-77; L. 53, 55-59); *supra* pp. 7-8.

As noted above, there are four private four-year women's colleges (and only one private men's college) in Virginia, and students at each of these women's colleges have the option of participating in an ROTC program. The Commonwealth provides substantial financial assistance to its female residents who choose to attend one of these private women's colleges. *Supra* pp. 8-9; Pet. App. 190a-91a.[24] And women take advantage of these opportunities to a far greater extent than men. In the Fall of 1989, for example, 3850 women, but only 944 men, were enrolled in private single-sex institutions in Virginia. Pet. App. 189a. Thus, women have a *greater* range of single-sex educational options in Virginia than men, and VMI helps fill a gap created by the private sector's failure to provide greater or more attractive single-sex opportunities for male college students. In effect, VMI's males-only admissions policy "serves to roughly 'equalize'" overall single-sex educational opportunities in Virginia for men and women, *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 473 (1981) (plurality opinion), and it is permissible for that reason as well.

CONCLUSION

Virginia's higher education system consists of a wide array of educational choices. The predominant segment of this system is coeducational, including an excellent and demanding coeducational Corps of Cadets program at VPI. A

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[24]By the same token, VMI derives most of its income from sources other than state appropriations. In the 1991-92 school year, for example, VMI derived less than 31% of its total operating budget from state appropriations, grants, and contracts. *See* II DX 21.

number of single-sex options for women also exist, with various forms of public financial assistance, at Virginia's several outstanding private women's colleges. VMI, which is publicly supported, but which also receives substantial private support, offers a valuable and effective single-sex educational option for men. Since its program has been proven to be highly effective in educating some young men and can only be provided in a single-sex environment, VMI's single-sex admissions policy is substantially related to the achievement of established and important governmental objectives. VMI's single-sex admissions policy therefore does not violate the Equal Protection Clause. Accordingly, the court of appeals' finding of liability should be rejected, and the judgment below should be affirmed on that ground.

Respectfully submitted.

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QUESTION PRESENTED

Whether the Equal Protection Clause permits a State, as one alternative in a primarily coeducational system of higher education, to afford its citizens the option of receiving the acknowledged benefits of single-sex education through methodologies designed by professional educators to accomplish optimal and substantively comparable pedagogical results for both women and men.

CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES iv
INTRODUCTION 1
STATEMENT 2
A. Mary Baldwin College 2
B. The Virginia Women's Institute For Leadership 3
1. Development of the VWIL Program 3
2. Description of the VWIL Program 7
C. The District Court's Remedial Decision 12
D. The Court of Appeals' Remedial Decision 13
SUMMARY OF ARGUMENT 15
ARGUMENT 18
I. THE SINGLE-SEX ADMISSIONS POLICIES AT VWIL AND VMI SUBSTANTIALLY ADVANCE LEGITIMATE AND IMPORTANT GOVERNMENTAL OBJECTIVES 19
II. THE VWIL PROGRAM FULLY REMEDIES ANY CONSTITUTIONAL VIOLATION THAT MAY HAVE EXISTED AS A RESULT OF VMI'S SINGLE-SEX ADMISSIONS POLICY 23
A. VWIL Offers Educational Benefits To Women That Are Comparable To Those Provided To Men By VMI 23
B. The Differences Between VWIL And VMI Are Pedagogically Justified And Are Not Based On Archaic Stereotypes 28

C. The Equal Protection Clause Does Not Require That Single-Sex Educational Programs Be Identical In All Respects..... 38

III. THE EQUAL PROTECTION CLAUSE DOES NOT MANDATE COEDUCATION AS THE ONLY PERMISSIBLE REMEDY IN THIS CASE 42

IV. STRICT SCRUTINY IS NOT APPLICABLE IN THIS CASE..... 47

A. The Issue Of Strict Scrutiny Issue Is Not Properly Presented..... 47

B. Strict Scrutiny Should Not Apply To Gender Classifications..... 48

CONCLUSION..... 50

TABLE OF AUTHORITIES

Cases	Page
Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995)	41,49
Arizona v. Rumsey, 467 U.S. 203 (1984)	49
Blum v. Yaretsky, 457 U.S. 991 (1982)	40
Califano v. Webster, 430 U.S. 313 (1977)	33,37,41,49
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)	49
Craig v. Boren, 429 U.S. 190 (1976)	33,42,49
Demarest v. Manspeaker, 498 U.S. 184 (1991)	48
Frontiero v. Richardson, 411 U.S. 677 (1973)	42
Goodman v. Lukens Steel Co., 482 U.S. 656 (1987)	18
Heckler v. Mathews, 465 U.S. 728 (1984)	41,43,49
J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419 (1994)	32,42
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Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981)	34,49

Milliken v. Bradley, 418 U.S. 717 (1974) 33

Mississippi Univ. for Women v. Hogan,
458 U.S. 718 (1982)..... *passim*

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Rendell-Baker v. Kohn, 457 U.S. 830 (1982)..... 40

Roberts v. United States Jaycees,
468 U.S. 609 (1984)..... 35

Rostker v. Goldberg, 453 U.S. 57 (1981) 32,34,41,49

San Antonio Indep. School Dist. v. Rodriguez,
411 U.S. 1 (1973)..... 33

Schlesinger v. Ballard, 419 U.S. 498 (1975) . 32,34,41,49

Stanton v. Stanton, 421 U.S. 7 (1975)..... 34

Sweatt v. Painter, 339 U.S. 629 (1950) 27

United States v. Doe, 465 U.S. 605 (1984) 18-19

United States v. Paradise, 480 U.S. 149 (1987)..... 28

Weinberger v. Weisenfeld, 420 U.S. 636 (1975) 33

Wisconsin v. Yoder, 406 U.S. 205 (1972)..... 33

Wood v. Strickland, 420 U.S. 308 (1975) 32

Yee v. City of Escondido, 112 S. Ct. 1522 (1992)..... 48

Zobrest v. Catalina Foothills School Dist.,
113 S. Ct. 2462 (1993)..... 48

Miscellaneous

U.S. Dep't of Education, National Center for Education Statistics, Digest of Education Statistics (1995) 39

U.S. News & World Report (Sept. 18, 1995)..... 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1941

UNITED STATES OF AMERICA

Petitioner,

v.

COMMONWEALTH OF VIRGINIA, *et al.*,

Respondents.

No. 94-2107

COMMONWEALTH OF VIRGINIA, *et al.*,

Cross-Petitioners,

v.

UNITED STATES OF AMERICA

Cross-Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF FOR THE RESPONDENTS

Respondents respectfully submit this brief in response to the brief for the petitioner in No. 94-1941.

INTRODUCTION

In addition to 14 diverse coeducational colleges and universities, the Commonwealth of Virginia offers students of either gender the opportunity to enroll in a public single-sex college program that is designed by experts in education to develop leadership and character through a comprehensive system of curricular and co-curricular activities including military training. Male students are offered this opportunity through the Virginia Military Institute (VMI), an his-

torically all-male undergraduate institution; female students are offered this opportunity through the Virginia Women's Institute for Leadership (VWIL), a state-supported program at Mary Baldwin College (MBC), an historically all-female private college. The question addressed in this brief is whether the Equal Protection Clause permits the Commonwealth to offer this combination of coeducational and single-sex educational opportunities for men and women.

STATEMENT

Petitioner's opening brief in No. 94-1941 presents an incomplete picture of the VWIL program and glosses over or contradicts crucial facts found by the courts below. This brief sets forth a more accurate and representative statement of the record and the remedial proceedings below.[1]

A. Mary Baldwin College

Mary Baldwin College (MBC), an historically women's college, was founded in 1842. MBC has responded to the changing role of women in society by expanding its curriculum "to include the new options open to women in business and the professions." Pet. App. 122a. MBC has "developed an emphasis on career planning," has "computerized the campus," and has added "new state of the art equipment for its science labs." *Id.* at 122a-23a. MBC "is committed to the education of women for a world of expanding opportunity." *Id.* at 122a.

MBC enrolls over 700 residential undergraduate students, has a Phi Beta Kappa chapter, is accredited by the Southern Association of Colleges and Schools, and is now ranked

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[1] In their opening brief as cross-petitioners in No. 94-2107 (Va. Br.), respondents set forth the facts concerning Virginia's system of higher education and the educational program offered at VMI. *See* Va. Br. 5-14.

first among regional liberal arts colleges in the South. *See* U.S. News & World Rep. 141 (Sept. 18, 1995); *see also* II DX 125 at 123. MBC's 55-acre campus in Staunton, Virginia, includes the facilities of the former Staunton Military Academy, residence halls, classroom buildings, computer and science laboratories, a 40,000-square-foot physical education facility, playing fields, tennis courts, and a swimming pool. Pet. App. 123a, 126a-29a.

The student-faculty ratio in MBC's residential program is 11 to 1. MBC offers 28 undergraduate majors, including degrees in mathematics, the sciences, business, and the arts, and also offers pre-law and pre-med programs and a joint-degree engineering program with the University of Virginia. 94-1941 Br. in Opp. App. (Opp. App.) 17a, 19a-23a; Pet. App. 123a-24a. MBC is "geared in the direction of trying to encourage women to persist in math and physics." *Id.* at 126a.

MBC enjoys "a record of success in developing new programs and operating distinctive and unique programs within the larger traditional undergraduate residential community." Pet. App. 125a. For example, MBC has successfully established a unique residential baccalaureate program for academically gifted, high-school-age students tailored to "the academic, emotional and developmental needs of young women." *Id.* at 126a.

B. The Virginia Women's Institute For Leadership

1. Development of the VWIL Program

After the initial decision of the court of appeals in this case, the Commonwealth consulted with education experts regarding the concept of a program for women parallel to VMI and then asked MBC to develop a publicly funded single-sex college leadership program with military training designed to accomplish the same results for women that VMI achieves for men. In 1993, MBC established a Task

Force to design a college program for women that "would prepare them for leadership positions in civilian and military life." Pet. App. 101a, 102a. The members of the Task Force, most of whom are experts in women's education at the college level, were appointed by Dr. Cynthia H. Tyson, President of MBC and herself an expert in single-sex education for women and in women's leadership and educational development. *Id.* at 63a, 93a, 102a.[2]

The Task Force was co-chaired by Dr. James D. Lott, Dean of MBC and an expert in single-sex education and leadership education for women, and by Dr. Heather Anne Wilson, Dean of Students at MBC and an expert in the psychological, social, emotional, and intellectual development of college women. Pet. App. 63a, 91a, 94a, 102a.[3] The

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[2]Petitioner's assertion (U.S. Br. 8) that the Task Force was "selected by respondents" is, quite simply, false. Pet. App. 102a; II Tr. 76.

[3]Petitioner denigrates the testimony of Dr. Wilson, suggesting (U.S. Br. 9 n.4) that her conclusions were based solely on the year she spent as a sorority advisor. *See* II DX 123. In fact, however, Dr. Wilson has a doctorate in higher education as well as master's degrees in counseling and in institutional planning and research, and she has more than 20 years of experience in higher education at both coeducational and women's institutions, including experience developing leadership programs for women. Pet. App. 94a-95a; II Tr. 326-28, 333 (II JA 584-86, 591). Her testimony covered far more ground than the brief aside quoted out of context by petitioner, and was based on the totality of her extensive and varied experience in higher education. II Tr. 324-58. Petitioner's demeaning caricature will come as no surprise to Dr. Wilson; petitioner's attempt to portray the VWIL program as based on invalid stereotypes was the charge she "f[ou]nd most offen[sive]. Between us, Dr. Tyson and Dean Lott and I have over 70 years of experience in advancing young women. We are not the sort of people who deal in stereotypes." II Tr. 342 (II JA 600).

Task Force included MBC faculty, administration, and student representatives. Pet. App. 102a-03a.

The Task Force "made an in-depth study of the published literature on the developmental psychology of women and the cognitive development of women" and "consulted outside experts" in addition to drawing on its own extensive collective experience in women's education. Pet. App. 63a, 103a. The Task Force was assisted by Dr. Richard C. Richardson, Jr., Professor of Educational Leadership and Policy Studies at Arizona State University, an expert in higher education and in the development of academic co-curricular programs. Pet. App. 63a, 91a-92a. Dr. Richardson has chaired 25 college accreditation teams, including the team that most recently evaluated the United States Military Academy at West Point. *Id.* at 92a.

The Task Force conducted "a detailed study of the appropriate methods by which the leadership program should be structured." Pet. App. 63a. Its members reviewed materials from VMI, met with their counterparts at VMI, examined "the VMI methodology and outcomes," and "observed VMI's holistic education" on visits to VMI. *Id.* at 104a; II Tr. 84-85, 87, 92 (II JA 430-31, 433, 438).[4] The Task Force "considered carefully, in light of their collective experience and the literature on women's education, where VWIL should follow or depart from the VMI methodology to produce the same outcomes." Pet. App. 104a. After detailed study, the Task Force concluded that VWIL should embody challenge in all parts of its program but that the optimal methods "for educating and training most women for leadership roles" in a single-sex college environment do

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[4]Thus, petitioner is incorrect in asserting (U.S. Br. 8) that the "Task Force did not consult anyone at VMI in planning the curriculum."

not include certain aspects of the VMI system. *Id.* at 63a.

The Task Force's goal was to create the best system for educating the young women who would attend VWIL, not blindly to copy every aspect of VMI's program. As Dr. Richardson explained, "the 'adversative' educational model has never been advanced by anyone as an appropriate paradigm for optimizing the development of women." II DX 11K at 4 (L. 308). Indeed, that system's inappropriateness "is evident from its abandonment or substantial modification in such military settings as the federal military academies and Virginia [Polytechnic] following coeducation." *Id.* The Task Force found

> no evidence that an extreme adversative environment . . . is appropriate for young women; we do find solid evidence, however, that an organized and disciplined environment which has as its purpose the building up of self confidence through mastery of physical, intellectual, and experiential challenges, *is* appropriate, is in fact the optimum environment for the education and training of women leaders.

II DX 39 at 3-4 (L. 329-30). The Task Force's members found little or no demand for a women's program identical to VMI. II Tr. 127, 340-41 (II JA 473, 598-99).

While it would have been "'easier to design'" the VWIL program to resemble VMI more closely, MBC determined that such a program would have had "'no real prospect of successful implementation.'" Pet. App. 11a. MBC felt that it would have been "'professionally irresponsible to compromise student welfare by designing a program to meet litigation objectives instead of student needs.'" *Id.*

Accordingly, the Task Force designed VWIL to develop women leaders through use of a "method which reinforces

self-esteem rather than the leveling process used by VMI." Pet. App. 64a.[5] The VWIL program is analogous to "the holistic VMI program, bringing together the co-curricular and the curricular to promote the student's development in all phases of her life." *Id.* at 63a. That program has been successfully implemented, and more than 40 women are presently enjoying the educational benefits of the VWIL program as its first-year class. TSR at 2.[6]

2. Description of the VWIL Program

VWIL offers women students the opportunity to obtain a single-sex undergraduate education with military training in an integrated program designed "to produce 'citizen-soldiers who are educated and honorable women, prepared for the varied work of civil life, qualified to serve in the armed forces, imbued with love of learning, confident in the functions and attitudes of leadership, and possessing a high sense of public service.'" Pet. App. 107a. Like VMI, VWIL offers an integrated and "highly structured program" that combines "the co-curricular and the curricular to promote the student's development in all phases of her life" and that pursues "the same five goals as those pursued at

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[5]Petitioner misleadingly implies that VWIL was designed to reflect "*respondents'* views of 'the differences and the needs of college-age men and women.'" U.S. Br. 8 (emphasis added). Nothing could be further from the truth. As the evidence and findings below clearly show, respondents did not dictate or control the design of the VWIL program. VWIL was designed by experts in single-sex education from MBC and elsewhere, not by the Commonwealth or VMI. It embodies those *experts'* views of the best methodology for developing the leadership skills of women college students in a single-sex environment.

[6]"TSR" refers to Defendants' Third Status Report, which was filed in the district court on October 31, 1995. Ten copies of that document have been lodged with the Court.

VMI: education, military training, mental and physical discipline, character development, and leadership development." *Id.* at 8a, 63a, 103a-04a. MBC is committed to making VWIL work and will make improvements as necessary to ensure the program's continued success. *Id.* at 30a, 106a; Opp. App. 13a-14a; II Tr. 1528-30 (II JA 1078-80).

As part of the VWIL program, students must demonstrate computer and foreign language proficiency and complete courses in calculus, statistics, and laboratory sciences. In addition, they must complete an extensive leadership development program including an externship and laboratory and speaker activities. *Id.* at 9a, 64a-65a, 108a-09a.[7]

As at VMI, VWIL's co-curricular offerings combine with the academic curriculum to create a comprehensive leadership-building experience. Women enrolled in VWIL are required to complete four years of ROTC, which is now offered through cross-enrollment agreements between MBC and the ROTC units at VMI.[8] VWIL students use the same ROTC curriculum, methods, and physical training and evaluation activities, and receive the same leadership training and military career opportunities, as all other ROTC students. Opp. App. 12a-13a; Pet. App. 67a, 109a, 116a-17a. VWIL students also constitute a corps of cadets, wear uniforms, receive military drill and ceremony training, and

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[7]MBC offers VWIL students a variety of science and mathematics majors as well as an opportunity to obtain a state-supported degree in engineering through a dual degree program with the nearby University of Virginia. *See supra* p.3.

[8]Petitioner incorrectly suggests (U.S. Br. 9-10 & n.6) that VWIL students will participate in the "Mary Baldwin ROTC program" that existed, with little student participation, prior to the creation of VWIL. Instead of that Army ROTC unit, VWIL students select from the same Air Force, Navy/Marine Corps, and Army ROTC units offered to VMI students.

participate in the Virginia Corps of Cadets, which consists of all VWIL, VMI, and Virginia Polytechnic Institute and State University (VPI) cadets. *Id.* at 110a; Opp. App. 13a. A chain of command has been established within VWIL, and each upperclass VWIL student will be assigned a military rank. Pet. App. 110a; TSR at 5 and Exh. 6.[9]

VWIL students are required to complete eight semesters of physical and health education, including self-defense and an advanced fitness course designed especially for VWIL students. Pet. App. 111a. They take a strength and endurance test each semester based on the national military standards for women, and must take additional physical training until they have passed the test. TSR at 5. They receive special "training in self-defense and self-assertiveness" as part of a Leadership Challenge Program that is mandatory for all freshman VWIL students except those participating in varsity sports and is "designed to be analogous to the VMI 'rat challenge'" physical fitness program. *Id.* at Exh. 5; Pet. App. 112a. VWIL's physical training program "is based on the VMI physical education program" and "is designed to be comparable in rigor and challenge to the physical training test for men at VMI." *Id.*[10] VWIL's physical training component "will produce women who are capable of serving physically in the military service." *Id.* at 113a.

Before the start of their freshman year, VWIL students (like VMI students) participate in a special "cadre week

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[9]Thus, petitioner errs in asserting (U.S. Br. 9-10) that "VWIL would provide no military framework or training other than the Mary Baldwin ROTC program."

[10]In addition to MBC's physical education facilities, VWIL students have access to VMI's facilities for various activities. Pet. App. 113a; *see* TSR at Exh. 5.

orientation" designed to provide "a physically and mentally demanding experience which will foster bonding and which will be a paradigm for VWIL itself." Pet. App. 110a, 114a. This year's program included physical training, ROTC orientation, training in military drill and ceremonies, and a 4-day wilderness orientation. TSR at 3.

Freshmen VWIL students room together in freshman residence halls and are subject to a variety of regulations, including room and uniform inspections and mandatory study periods. Pet. App. 114a; TSR at 4, 6-7. "[T]he VWIL program will use the highly disciplined schedule of the VMI model." Pet. App. 66a-67a, 114a. After their freshman year, VWIL students are required to live for at least one year in the VWIL House, which is the center for VWIL meetings and activities. *Id.* at 115a-16a.

Upperclass VWIL students will serve as mentors for incoming VWIL students. Pet. App. 115a.[11] In addition, upperclass students will play an important role in orienting incoming students, enforcing rules and regulations, teaching VWIL standards and expectations, organizing and directing drills, and leading the VWIL Corps. *Id.* at 115a-16a.[12] VWIL students are subject to MBC's honor code, which (like VMI's honor code) proscribes lying, cheating, stealing, and failure to report any of those infractions. *Id.*

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[11]Petitioner asserts (U.S. Br. 11) that VWIL will not use VMI's mentoring system (known as the "dyke" system, *see* Pet. App. 196a-97a, in reference to the cross-belted dress uniforms worn by VMI students, *see* I Tr. 142 (I JA 390)), but petitioner cannot identify any meaningful difference in the goals of these two mentoring programs.

[12]Thus, contrary to petitioner's assertion (U.S. Br. 11), upperclass VWIL students will have expanded leadership roles and organizational duties similar to those given to upperclass VMI students through VMI's "class" system. *See* Pet. App. 196a.

at 114a-15a; II Tr. 1526 (II JA 1076); II DX 82 at 24.

Both the Commonwealth and VMI have provided extensive financial and other support for the development and implementation of VWIL, and they and MBC are committed to the program's continued success. Pet. App. 63a, 81a-83a, 102a-06a. The Commonwealth has expressed "unambiguous and unequivocal support of single-sex education for men and women," and the highest-ranking Virginia officials "have strongly supported VWIL." *Id.* at 81a, 83a. Virginia's General Assembly has enacted legislation mandating equal funding on a per-student basis for VWIL and VMI, without any limit on the maximum number of VWIL students. *Id.* at 10a, 80a & nn. 18-19; Opp. App. 12a.

VMI has cooperated extensively in the development and implementation of VWIL, and "has committed to support the VWIL program." Pet. App. 102a, 105a. VMI and MBC have formed a joint leadership education advisory board that will monitor the outcomes of the two programs. *Id.* at 105a; Opp. App. 6a, 14a; *see also id.* at 17a, 24a-26a. The VMI Foundation has provided substantial financial support for VWIL and is committed to providing an additional $5.5 million endowment once final court approval has been obtained. Pet. App. 120a; Opp. App. 6a-7a, 12a.

VMI is providing VWIL with full access to and support from its alumni network. VMI alumni and admissions personnel assist in recruiting for VWIL. Pet. App. 120a-21a; Opp. App. 3a, 5a, 10a, 14a. The VMI Alumni Association has opened its placement services and networks to VWIL, will assist VWIL students in obtaining leadership externships, and has begun to develop joint alumni networking opportunities with MBC. *Id.* at 6a; Pet. App. 120a-21a. VMI's alumni are "extremely supportive" of VWIL and are "committed to making [it] work." *Id.* at 121a.

C. The District Court's Remedial Decision

After a trial, the district court found that the single-sex programs at VWIL and VMI comply with the Equal Protection Clause. Rejecting petitioner's argument that Virginia was required to provide an exact replica of VMI for women despite the contrary recommendations of experienced educators, the court expressly found that "VWIL is a good design for producing female citizen-soldiers" and that "the differences between VWIL and VMI are justified pedagogically and are not based on stereotyping." Pet. App. 67a, 76a. In support of these findings, the court relied upon expert testimony that "the VWIL approach towards educating and preparing women leaders was preferable to the VMI approach" and indeed that "the demand for an all-women's VMI would be so small as to make the project unfeasible," whereas "there would be much more significant demand for VWIL." *Id.* at 73a, 75a & n.12.

The court relied on the testimony of Dr. Elizabeth Fox-Genovese, "one of the leading experts on the educating of women," who testified that "an adversative method of teaching in an all-female school would be not only inappropriate for most women, but counter-productive," because it would be destructive of women's self-confidence. Pet. App. 64a, 74a. Petitioner did not offer the testimony of *any* experts in single-sex education to refute this testimony. Moreover, the court expressly rejected the testimony of petitioner's expert in psychology, who asserted that the differences in methodology at VMI and VWIL were based on stereotypes. The court explained that this expert's "testimony was contradicted by most of the evidence in the record." *Id.* at 72a-73a. Indeed, even this expert acknowledged that there were developmental differences between college-age men and women and that women would "have more chances for leadership at single-sex institutions." *Id.*; II Tr. 914, 916, 918-19 (II JA 869, 871, 873-74).

The district court also found that the evidence "supplies a reasonable basis for predicting [VWIL's] success in attaining its stated goals" of producing citizen-soldiers well prepared for leadership roles in civilian and military life. Pet. App. 83a. Based on the experts' conclusions that "the methods adopted for the VWIL will produce the same or similar outcome for women that VMI produces for men" (*id.* at 64a) and that "VWIL will produce the kind of self-assurance in the face of accomplishment of difficulties that VMI offers" (*id.* at 75a-76a), the district court rejected petitioner's argument that the Constitution requires that single-sex institutions be identical in every respect. Instead, the court held that VWIL remedied any constitutional violation because it "will achieve substantially similar outcomes in an all-female environment and . . . there is a legitimate pedagogical basis for the different means employed to achieve the substantially similar ends." *Id.* at 76a.

D. The Court of Appeals' Remedial Decision

The court of appeals affirmed. In addition to the two-pronged test of *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), the court applied a third requirement, which entails "carefully weighing the alternatives available to members of each gender denied benefits by the classification" in order to determine whether those alternatives are "substantively comparable." Pet. App. 17a.[13]

Turning to the first prong of the *Hogan* test, the court reaffirmed the district court's factual finding that "single-gender education at the college level is beneficial to both

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[13]Petitioner appears to argue (U.S. Br. 13) that the court of appeals failed to apply the two prongs of the test enunciated in *Hogan*, but the court of appeals made clear that its analysis included both prongs of that test. *Compare* Pet. App. 16a *with* 458 U.S. at 724.

sexes," and concluded that offering "single-gender education as one particular pedagogical technique among many" is "a legitimate and important governmental objective." Pet. App. 20a, 21a. The court next held that the Commonwealth's decision to provide single-sex education through VMI and VWIL was directly related to the Commonwealth's legitimate and important objectives, because "the only way to realize the benefits of homogeneity of gender is to limit admission to one gender." *Id.* at 22a. In addition, the court found that "single-gender education at VMI is also directly related to achieving the results of" the VMI system, because essential "'characteristics of VMI's program'" were incompatible with a coeducational environment. *Id.* at 6a-7a, 23a.[14]

The court also concluded that the benefits offered by VMI and VWIL were "substantively comparable." Pet. App. 24a-28a. After scrutinizing the two programs, the court found that "the mission and goals are the same, and the methodologies for attaining the goals, while different, nevertheless are reasonably calculated to succeed at each institution." *Id.* at 27a. The differences in the two programs are justified because they are "attributable to a professional judgment of how best to provide the same opportunity." *Id.* at 26a. Indeed, as the court explained, provid-

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[14]Petitioner suggests (U.S. Br. 14, 29-30) that this conclusion was predicated on the court's remark that direct cross-sex harassment in an adversative setting would destroy "'any sense of decency that still permeates the relationship between the sexes.'" In fact, however, this conclusion was based on and supported by extensive evidence and findings from the liability phase of the case which demonstrated conclusively that VMI's method would have to be changed substantially if it were to be implemented in a coeducational setting, thus precluding any student from obtaining the benefits derived from that method. Pet. App. 6a-7a; Va. Br. 16-19, 34-36; *see infra* pp. 43-47.

ing women with a program identical to VMI would not be consistent with reasoned educational theory and experience, because "[e]ducational experts" believed that many women "may not respond similarly" to an adversative approach and that a women's program identical to VMI "would attract an insufficient number of participants to make the program work." Pet. App. 27a.

The court of appeals accordingly upheld the remedy approved by the district court. In order to ensure the effective and successful implementation of VWIL, the court remanded the case to the district court with instructions to oversee the remedy. Pet. App. 30a.

SUMMARY OF ARGUMENT

The fundamental question presented in this case is whether a State may offer the option of single-sex education to both men and women as part of a diverse and primarily coeducational system of higher education. It is an established and unchallenged fact in this case that single-sex education offers substantial pedagogical advantages to many young men and women. Both VMI and VWIL therefore advance important and legitimate state objectives by offering college students of both genders a comparable opportunity to obtain an affordable single-sex education in a program emphasizing leadership and character development.

It is also an established fact that VWIL and VMI offer comparable educational benefits to their respective students. VWIL and VMI are each designed to achieve the same goals and use similar methods to achieve those goals. Both programs offer leadership and character development through an interconnected system of curricular and co-curricular activities including challenging course requirements, a rigorous physical fitness program, extensive military training through ROTC, a disciplined schedule, a mentoring program, an honor code, and a system of increasing re-

sponsibilities and leadership roles for upperclass students. Both combine these attributes with the proven benefits of a single-sex residential setting to provide an environment for the development of leadership and character.

The only differences between VMI's and VWIL's programs reflect the considered judgments of professional educators as to the most effective methods for educating their respective students. VWIL's design is based on observable psychological and sociological norms that even petitioner's experts conceded are real, not on archaic or harmful stereotypes of the type condemned in this Court's cases. The differences in technique between VMI and VWIL are directly attributable to a reasoned analysis of modern scholarship and professional determinations regarding the most successful techniques for educating women college students for leadership roles in modern society. Moreover, it was established below that there is insufficient demand among women college students for a precise replication of the VMI methodology, so the differences between VWIL and VMI are independently justified by the need to attract a student body large enough for the program to be effective.

VMI and VWIL do not foster or perpetuate impermissible and outmoded stereotypes about women's role in society. To the contrary, VWIL and VMI together reflect the conviction that women and men are equally well suited for leadership roles in all walks of life, and VWIL's graduates will be every bit as qualified as VMI's to assume leadership positions in the military and elsewhere. Indeed, it is stereotypical to presume that a women's single-sex college program must mimic every aspect of VMI to be successful. Thus, Virginia unequivocally supports the proposition that men and women are equally capable of serving society in positions requiring tough and aggressive leaders. But Virginia also believes (and the courts below found) that single-sex education is the best means for preparing some

young people for such roles, and that professional educators -- not lawyers or judges -- should be given the discretion and academic freedom to use their expertise in designing effective and successful single-sex educational programs.

There is no merit to petitioner's argument that the single-sex admissions policies of VWIL and VMI are unconstitutional if there exists a single person who would prefer the program offered by the other institution. If petitioner were correct, there could be no public support for single-sex education at any level. Moreover, petitioner's argument is inconsistent with numerous precedents of this Court recognizing that government may classify on the basis of gender as long as the classification is "substantially related" to achieving an important governmental interest.

Coeducation is not the only permissible educational methodology for Virginia and other States. Indeed, because VWIL offers women (as VMI offers men) the benefits of single-sex education as well as the additional advantages of a rigorous leadership and character development program, petitioner's preferred remedy would be *less* effective than that provided by Virginia and approved by the courts below. Petitioner's claim that VMI could become coeducational without meaningfully changing its program is contrary to the record and findings below. The finding that VMI could not offer the benefits of its program if it were to become coeducational reflects, not impermissible stereotyping, but the reasoned conclusions of expert witnesses and the experience of other institutions demonstrating that fundamental characteristics of the VMI system would be changed dramatically in a coeducational setting. Coeducation at VMI would destroy both its single-sex nature and important elements of its adversative system, thereby eliminating diversity while offering no educational opportunity to women that is not already available elsewhere.

Petitioner's proposal that strict scrutiny should apply to

gender classifications is not properly presented. Petitioner failed to raise that question below, the courts below did not address it, and petitioner affirmatively disclaimed reliance on that standard both in this Court and in the courts below. In any event, petitioner offers no special or compelling reasons for departing from the Court's precedents in this area.

ARGUMENT

The central, though unspoken, premise of petitioner's brief is that the Constitution should be construed to forbid public single-sex education. Even while effectively conceding that single-sex educational programs offer proven and demonstrable educational benefits to many students, particularly those from disadvantaged backgrounds who are least able to afford a private education, petitioner seeks to impose on the Nation its dogmatic view that coeducation is the only permissible methodology for all public schools. Fortunately, neither precedent nor public policy supports petitioner's attempt to substitute its own preferences for the reasoned analyses and scholarly conclusions of the professional educators responsible for creating and maintaining the valuable and beneficial single-sex programs at issue in this case.

The facts of this case reveal with irresistible force the importance of preserving the ability of state and local governments to offer single-sex programs like VWIL and VMI as a complement to their primarily coeducational systems of public education. Rather than address those facts on the merits, petitioner repeatedly ignores or substitutes its own unsubstantiated opinions for the findings below on a host of issues, from the sincerity of respondents' interest in single-sex education to the impact of coeducation on the educational experience offered by VMI. It is settled law, however, that this Court will not set aside facts found by two lower federal courts. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *United States v. Doe*, 465 U.S. 605,

614 (1984). Petitioner's attempts to rewrite the record and findings at this stage of the case and its last-minute advocacy of a new and higher standard of review betray petitioner's apparent recognition that it cannot prevail on the actual record below or the legal standard heretofore applied by this Court to issues such as these. Petitioner's approach is contrary to this Court's settled practice and should not be permitted to succeed.

I. THE SINGLE-SEX ADMISSIONS POLICIES AT VWIL AND VMI SUBSTANTIALLY ADVANCE LEGITIMATE AND IMPORTANT GOVERNMENTAL OBJECTIVES

Under *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), a public college's single-sex admissions policy is permissible if it "serves 'important governmental objectives'" and is "'substantially related to the achievement of those objectives.'" 458 U.S. at 724. VWIL and VMI are constitutional under that standard.

The courts below found, based on modern research and extensive expert testimony, that single-sex education provides unique benefits for many college students of both sexes. *See* Va. Br. 14-15, 26-27.[15] The district court explained that "[t]he record is replete with testimony that single gender education at the undergraduate level is beneficial to both males and females." Pet. App. 167a. It found that "[b]oth men and women can benefit from a single-sex education" and that "the opportunity to attend a single-sex college is a valuable one, likely to lead to better academic and professional achievement" for some students. *Id.* at 168a, 174a, 225a-27a. The court concluded that the "virtually

[15]Even petitioner conceded below that "there is ample evidence in the record on the value of single-gender education." II Tr. 238.

uncontradicted" evidence supports "Virginia's view that substantial educational benefits flow from a single-gender environment, be it male or female, that cannot be replicated in a coeducational setting." *Id.* at 176a.

The court of appeals affirmed these findings, holding that single-sex education "provid[es] substantial benefits to college students" and "has been found to have salutary consequences for sexual equality in the job market." Pet. App. 149a. The court also found that "[t]he experts for both sides in this case appear to agree with" these conclusions. *Id.* at 150a; *see id.* at 168a, 225a. Thus, it is "a fact established in this case" that "single-gender education at the college level is beneficial to both sexes." *Id.* at 20a.

As respondents have already explained in detail, the proven benefits of single-sex education are a central and important part of the overall experience afforded to VMI's students. *See* Va. Br. 24-36; Pet. App. 61a, 148a, 227a. Indeed, both courts below concluded that "the legal justification for VMI's all-male admission policy [i]s contained in the benefits that flow from a single-sex education." *Id.* at 61a. While Virginia had historically afforded women the same opportunity to receive the benefits of single-sex education at publicly supported women's colleges and universities, Virginia's public women's colleges and universities each chose to become coeducational in recent years. *See* Va. Br. 6-7.[16] Virginia has now remedied this anomaly by creating VWIL, which (in addition to paralleling other aspects of VMI's program) replicates the benefits of VMI's single-sex educational environment by reestablishing public

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[16]The Commonwealth has continued to provide financial support for women's single-sex college education through various programs of aid and assistance to Virginia's private colleges, including several women's colleges. *See* Va. Br. 8-9.

single-sex education for women in Virginia.[17]

Petitioner has never challenged directly the factual *finding* that single-sex education provides substantial pedagogical benefits for some men and women that cannot be replicated in a coeducational setting. Instead, petitioner offers only the *ipse dixit* that "[c]ontrary to the *assumption* of the court of appeals, single-sex education is not self-justifying," and contends, without any basis in fact, that respondents do not "have a genuine interest in providing single-sex education to college students in Virginia." U.S. Br. 45 n.32, 47 (emphasis added).

As respondents have demonstrated (Va. Br. 24-28), however, States have an important and legitimate interest in providing diverse and beneficial educational options to their citizens. The record and findings in this case clearly establish that single-sex education has proven benefits for many students at the college level and enhances the diversity of a State's educational offerings. Petitioner disputes none of these propositions, and thus there can be no doubt that the objective of providing the benefits of single-sex education as part of a large, diverse, and primarily coeducational system of higher education is an important and legitimate one.

It is equally clear that respondents have a genuine interest

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[17]Indeed, VWIL may surpass VMI in this respect; the district court found that the benefits of a single-sex college education are, if anything, "stronger among women than among men." Pet. App. 174a. Contrary to petitioner's suggestion (U.S. Br. 46), moreover, women are not limited to the VWIL single-sex option. Virginia offers a wide menu of public coeducational opportunities at the college level, including the residential Corps of Cadets and ROTC unit at VPI, which (like VMI and VWIL) emphasizes leadership and character development and military training. Pet. App. 214a-18a; Stipulations 49-54 (I JA 94-99; L. 76-81); *see also* Va. Br. 9-10.

in achieving that objective. Petitioner's contrary argument is fully answered elsewhere (*see* Va. Br. 28-32) and in any event rests entirely on circumstances that no longer exist. Petitioner completely ignores the findings below that, in establishing VWIL, respondents have unequivocally demonstrated the genuineness of their support for single-sex education for both men and women in Virginia. The district court found as a matter of fact that "[t]he record in this case shows the Commonwealth's unambiguous and unequivocal support of single-sex education for men and women." Pet. App. 81a; *see id.* at 81a-83a & n.20. Indeed, "every person in Virginia's officialdom who has or has had the authority to affect Virginia's policies on higher education has spoken in favor of diversity by offering single-sex education to men and women of the Commonwealth." *Id.* at 83a; *see also id.* at 29a.

The single-sex admissions policies at VMI and VWIL are also substantially related to the achievement of important governmental objectives. Plainly, "the only way to realize the benefits of homogeneity of gender is to limit admission to one gender." Pet. App. 22a. Exclusion of men from VWIL and women from VMI is directly and precisely related to achieving the legitimate and important objective of providing the benefits of a public single-sex college education to the students who seek them.

The single-sex nature of the educational experience at VMI and VWIL is also central to the attainment of the additional benefits provided by those programs' specific emphasis on leadership training and development. VMI's methodology is inextricably connected to its single-sex environment (*see infra* pp. 43-47; Va. Br. 33-36), and VWIL is designed to maximize the benefits of its leadership program by capitalizing on the single-sex nature of the program. Indeed, the MBC Task Force found that, because of the need to combat cultural stereotyping, "[l]eadership de-

velopment for women will be most effective . . . if it takes place in a single-sex environment of challenge and support . . . ." II DX 39 at 3 (II JA 255; L. 329).[18] Thus, the single-sex admissions policies at VWIL and VMI are substantially related to the achievement of important state objectives, and they satisfy the requirements of *Hogan*.

II. THE VWIL PROGRAM FULLY REMEDIES ANY CONSTITUTIONAL VIOLATION THAT MAY HAVE EXISTED AS A RESULT OF VMI'S SINGLE-SEX ADMISSIONS POLICY

A. VWIL Offers Educational Benefits To Women That Are Comparable To Those Provided To Men By VMI

Petitioner contends (U.S. Br. 22-23, 42-43) that VWIL does not remedy the constitutional violation found by the court of appeals because women continue to be denied the benefits of attending VMI. That contention is refuted fully by the record and findings below, which demonstrate that the ultimate benefits afforded to VWIL's students are equivalent to those received by students attending VMI.

VMI's mission is "to produce educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary." Pet. App. 203a. The courts below found that VMI accomplishes that mission by providing its students both the proven benefits of a single-sex college education and the additional benefits of VMI's educational method, which combine to produce self-discipline, confidence, character,

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[18]Even one of petitioner's experts conceded that "women have more chances for leadership at single-sex institutions" and that "men and women are treated differently in the classroom," a trend that "could be exacerbated in a co-educational environment." Pet. App. 73a & n.9.

and leadership skills for military and civilian life. Pet. App. 54a, 150a-51a, 155a, 203a-04a, 225a-27a.

VWIL was purposefully designed to provide these very same benefits to its students. Its mission is "to produce the 'citizen soldier,' *i.e.*, women who are trained for leadership in both civilian and military life," and it pursues "the same five goals as those pursued at VMI: education, military training, mental and physical discipline, character development, and leadership development." Pet. App. 8a, 63a.

The means employed by VWIL to achieve these same goals are similar in many respects to those employed by VMI, although the creators of VWIL chose not to adopt some aspects of VMI's educational method. Like VMI, VWIL emphasizes leadership and character development through an integrated and rigorous program of physical and mental challenges and leadership opportunities. Like VMI, VWIL includes military training leading to the possibility of a military career and prepares its students for positions of prominence in either civilian or military life. *See generally* Pet. App. 8a-10a, 25a-26a, 62a-64a, 67a.

VWIL's physical education regimen "is designed to be comparable in rigor and challenge to the physical training test for men at VMI," Pet. App. 112a, and is unsurpassed in the demands it imposes on women students. VWIL's co-curricular component uses "the highly disciplined schedule of the VMI model" (*id.* at 67a), and combines with the other elements of the VWIL program to provide an integrated system for the development of self-confident leaders. The VWIL program incorporates a mentoring scheme and a system of increasing authority, leadership, and responsibilities for upperclass students analogous to VMI's "dyke" and "class" systems. VWIL students are subject to an honor code and are organized along military lines to provide each student an opportunity to experience various roles in the military hierarchy. The ROTC and military career

opportunities available to VWIL students are coextensive with those for VMI's students. *See supra* pp. 8-9.[19]

Most importantly, VWIL (like VMI) affords its students the benefits of a single-sex college education. Petitioner virtually ignores this aspect of the VWIL program; petitioner's opening brief contains no recognition of the special benefits that single-sex education provides to the students who choose it. Petitioner's reluctance to acknowledge the importance of the single-sex nature of the VMI and VWIL programs, however, cannot change the crucial significance of that attribute of both programs. *See supra* Part I. Indeed, by providing women the opportunity to enroll in a publicly supported undergraduate program emphasizing leadership, military training, physical and mental rigor, and character development in a single-sex environment, VWIL provides a closer parallel to VMI's program than any coeducational school could hope to offer.

After carefully considering the design, structure, and goals of the VWIL program, the courts below found that the educational benefits provided by VWIL to its women students will be equivalent to those provided by VMI and that any differences in methodology are "attributable to a professional judgment of how best to provide the same opportunity." Pet. App. 26a, 28a, 76a, 83a. In particular, the district court found that "MBC is committed to providing to the VWIL women benefits that are equal to *or better than* the benefits provided to men at VMI," and concluded that VWIL "will achieve substantially similar outcomes in an all-female environment." *Id.* at 68a, 76a (emphasis added). This conclusion was based on the testimony of ac-

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[19]As the foregoing discussion demonstrates, petitioner is manifestly wrong when it asserts (U.S. Br. 9) that VWIL's designers "rejected every component of VMI's system."

knowledged experts in higher education who studied the VWIL program in detail. For example, Harvard University Professor David Riesman "concluded that VWIL will produce the kind of self-assurance in the face of accomplishment of difficulties that VMI offers and requires of its cadets." *Id.* at 75a-76a. Similarly, Dr. Richardson testified that VWIL will offer women "a comparable opportunity to achieve outcomes which men achieve at VMI." II Tr. 622; *accord* II DX 11K at 3 (II JA 155; L. 307). Dr. Elizabeth Fox-Genovese, "one of the leading experts on the educating of women, . . . concur[red] in th[at] assessment." Pet. App. 64a. In short, VWIL offers "an education for women equivalent in rigor, focus and outcome to that offered to men at VMI." II DX 11K at 6 (II JA 158; L. 310).

The court of appeals endorsed these conclusions. The court noted that "both VMI and VWIL are focused on results beyond simply awarding an undergraduate degree. Both seek to teach discipline and prepare students for leadership." Pet. App. 26a. Thus, "the mission and goals are the same, and the methodologies for attaining the goals, while different, nevertheless are reasonably calculated to succeed at each institution." *Id.* at 27a.[20]

Petitioner ignores these conclusions and argues (U.S. Br. 22-23) that VWIL's benefits are not comparable to VMI's because VWIL cannot offer "the benefits of association with an established and renowned institution" and its "'enormously influential'" alumni "network."[21] That con-

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[20]Petitioner's experts conceded that "any given set of outcomes can be obtained by more than a single methodology." Pet. App. 68a.

[21]Petitioner also points to VMI's allegedly "powerful prestige" (U.S. Br. 20), but VMI does not enjoy the academic prestige of public coeducational institutions like the University of Virginia, the College of William and Mary, or VPI. VMI attracts

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tention overlooks the facts that MBC is a highly regarded institution in its own right with its own valuable "networks," and that VWIL's graduates *will* enjoy the benefits of access to the VMI alumni "network" as well. As noted above (*supra* p.2), MBC is one of the finest liberal arts colleges in the South. Moreover, "VWIL graduates will have the same access to the VMI placement network as VMI graduates." Pet. App. 121a; *see supra* p.11.[22]

For all the foregoing reasons, petitioner is incorrect in suggesting (U.S. Br. 46) that VMI and VWIL "are vastly different in content and in the value of the degree they offer." The record and findings below flatly contradict that assertion and demonstrate that VMI and VWIL provide comparable benefits through analogous, though not identical, single-sex educational programs designed by experts to accomplish precisely the same goals. Petitioner offers no

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"average" students, and its academic reputation is comparable to MBC's. Pet. App. 206a; II Tr. 244-45 (II JA 565-66).

[22]The Government's reliance (U.S. Br. 23) on *Sweatt v. Painter*, 339 U.S. 629 (1950), is wide of the mark. That case involved a *racial* classification, not a gender-based classification, and this Court has never applied (or even cited) *Sweatt* in a gender case. Moreover, there is (quite rightly) no suggestion in *Sweatt* that racial segregation of law students provides any meaningful or valid educational benefits, whereas the record in this case is clear that single-sex education at the college level does provide important pedagogical benefits that cannot be replicated in a coeducational setting. Finally, while VWIL itself is a new program, MBC is a respected institution with a 150-year history of successfully educating young women, and VWIL graduates will enjoy the added benefits of access to the VMI alumni network as well.

justification for ignoring these factual findings.[23]

B. The Differences Between VWIL And VMI Are Pedagogically Justified And Are Not Based On Archaic Stereotypes

VWIL was designed to provide the optimum environment for producing successful women leaders, and "[t]he methods by which this goal could be achieved were the subject of intensive study and planning by professionals who are leaders in the field of designing and implementing educational programs for women." Pet. App. 63a. VWIL's designers carefully incorporated the most persuasive and contemporary research on leadership development. Choosing to depart from certain aspects of VMI's extreme adversative method, they created an analogous, carefully tailored and rigorous program designed to achieve the same results while attracting and successfully educating a significant number of students.

The district court found that modern scholarship and research have identified "important differences between men and women in learning and developmental needs," and that these "psychological and sociological differences are real differences, not stereotypes." Pet. App. 224a, 225a. The court concluded that VWIL was carefully designed to achieve the same results as VMI by taking account of these factors. Thus, "the differences between VWIL and VMI are justified pedagogically and are not based on stereotyp-

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[23]Petitioner's challenge to the adequacy of the remedy approved below also ignores the fact that district courts enjoy wide discretion in determining the proper scope of remedies for constitutional violations. This Court has "recognized that the choice of remedies to redress [equal protection violations] is 'a balancing process left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court.'" *United States v. Paradise*, 480 U.S. 149, 184 (1987).

ing." *Id.* at 76a. The court of appeals agreed, explaining that "the difference [between VWIL and VMI] is attributable to a professional judgment of how best to provide the same opportunity." *Id.* at 26a.

Petitioner is unable to refute the conclusions of the experts and the factual findings of the courts below, so it simply substitutes its opinions for those findings, asserting (U.S. Br. 37-40) that every conclusion with which it disagrees is the product of impermissible stereotypes. That approach is unwarranted, for several reasons.

In the first place, neither respondents nor the courts below relied on any broad generalization that all women would prefer VWIL's methods to VMI's or that no woman could succeed in an adversative-type program. To the contrary, the MBC Task Force and respondents' experts recognized, and the district court found, that some women could succeed in, and "may" prefer, a program identical to VMI's. Pet. App. 76a; *see id.* at 8a; I Tr. 702 (I JA 949).

The expert analyses and testimony at trial demonstrated, however, that VMI's methodology would be ineffective or counterproductive for many, if not most, women college students. Pet. App. 73a-76a. The experts relied on their own years of experience and on scholarly studies demonstrating that many young women enter college with different needs than their average male counterparts in areas such as confidence and self-esteem and benefit appreciably from a challenging yet supportive single-sex college environment like that offered by the VWIL program. *Id.* at 73a-74a; II DX 130A (II JA 280-319). These experts concluded "that the VWIL approach towards educating and preparing women leaders was preferable to the VMI approach," and indeed that the VMI method would be counterproductive for, and have a "discriminatory impact on," many women students. Pet. App. 64a, 73a; II DX 11K at 4 (II JA 156).

The creators of VWIL could easily have chosen to model that program more precisely along the VMI lines, but their experience, education, study, and instincts led them to create a program that they believed would be vastly more successful in educating young women leaders in a single-sex environment. *See* Pet. App. 11a; II DX 11K at 6 (II JA 158; L. 310). The evidence, and the factual findings below, confirm the soundness of that judgment. Indeed, for VWIL's designers to have blindly and unthinkingly replicated VMI's methods would have made them guilty of precisely the sort of arbitrariness that petitioner purports to condemn. Professional educators are obviously in the best position to design and implement college programs aimed at developing successful leaders, and the results of that process in this case cannot legitimately be dismissed as stereotypical merely because they do not conform to petitioner's preconceived policy preferences.

Petitioner has combed the record below for snippets of testimony (U.S. Br. 37-40), much of it wholly unrelated to the VWIL program, in an attempt to bolster its claim that VWIL's design reflects stereotyped views. But that attempt to impugn as archaic stereotypes the scholarly conclusions cited above is directly contradicted by the findings below and ignores the fact that even petitioner's witnesses provided support for these conclusions. For example, a study conducted by one of *petitioner's* experts found that "the declines in psychological well-being (feeling depressed, feeling overwhelmed, low self-rating on emotional health) are all stronger among women than among men during the undergraduate years." II DX 104 at 404-05 (II JA 278; L. 346). Another of petitioner's experts conceded that "[t]he psychological and sociological differences between men and women are real differences, not stereotypes." Pet. App. 225a.

A third expert for petitioner admitted that "there clearly

are differences between men and women, and not only obvious physiological ones, but ones having to do in part with how they interact, how they learn and so on." I Tr. 377 (I JA 625); II Tr. 1083 (II JA 913). This expert further testified that he was not aware of any stereotyped views being expressed by the members of the MBC Task Force. II Tr. 1089-90 (II JA 918-19).

Although petitioner complains that VWIL is not identical to VMI, it is most telling that none of petitioner's experts was willing to recommend VMI's adversative method as an appropriate educational methodology for developing women leaders. Indeed, petitioner's experts testified that they were unaware of *any* educational authorities who advocated the VMI approach for educating women (II Tr. 956, 1105, 1301 (II JA 889, 923, 992)), and some stated that they would not recommend the adversative method for either men or women. II Tr. 902, 1300-01 (II JA 861, 991-92). Nor did petitioner's experts assert that the VWIL program would be inappropriate or ineffective for women. Pet. App. 68a, 76a. In fact, petitioner's expert on curricular and co-curricular offerings admitted that neither VMI's program nor VWIL's program was "better than the other." *Id.* at 69a n.5, 96a.

Petitioner's claim of impermissible stereotyping also ignores the fact that the demand among women college students for an adversative program like that offered at VMI is too small to make such a program workable. As detailed elsewhere (*see* Va. Br. 43-45), the evidence at trial showed that "there would be little demand for a female VMI" and that the VMI model "is deficient from the standpoint of attracting a sufficient clientele" from among women college students. Pet. App. 27a, 73a, 75a & n.12; II DX 11J at 5 (II JA 148; L. 300). Wholly aside from the pedagogical reasons for preferring the VWIL model, therefore, the differences between VWIL and VMI are justified by the need

to attract sufficient numbers of women students to make the program workable.[24]

At bottom, petitioner's challenge to the VWIL program rests upon a fundamental misconception about the nature of the stereotypes condemned by this Court's precedents. Petitioner assumes that a gender-based classification is invalid unless it relates to characteristics that hold true in every individual instance. But this Court's cases do not support such a categorical approach. In *Schlesinger v. Ballard*, 419 U.S. 498 (1975), for example, the Court upheld a statute granting female Navy officers longer tenure before mandatory discharge than their male counterparts. The Court specifically rejected the contention that the gender-based classification was based on impermissible "archaic and overbroad generalizations," explaining that female officers "will not *generally* have compiled records of seagoing service comparable to those of male[s]." *Id.* at 508 (emphasis added). The Court did not purport to require that this generalization be true in every instance; rather, the Court found it permissible because it reflected current reality rather than the types of outmoded stereotypes condemned in past cases. *See id.* at 507.[25]

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[24]That fact alone serves to distinguish this case from *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994), and other cases in which a woman's ability to receive a government benefit did not depend upon locating a substantial number of other qualified women willing and able to join her.

[25]As this Court noted in *Rostker v. Goldberg*, 453 U.S. 57, 71 (1981), "*Schlesinger* v. *Ballard* did not purport to apply a different equal protection test because of the military context." The *Ballard* Court did "stress the deference due congressional choices among alternatives" in the military context (*id.*), but deference is also due to the decisions of state and local governments regarding the best means of educating their citizens. *See, e.g., Wood v. Strickland*, 420 U.S. 308, 326

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Similarly, *Califano v. Webster*, 430 U.S. 313, 318 (1977), upheld a statute giving women higher social security benefits than men because "women . . . have been unfairly hindered from earning as much as men." Although this rationale was plainly not applicable to every affected individual, the Court expressly rejected the suggestion that it reflected "'archaic and overbroad generalizations' about women" or "'the role-typing society has long imposed' upon women, such as casual assumptions that women are 'the weaker sex' or are more likely to be child-rearers or dependents." 430 U.S. at 317 (citations omitted).[26]

The lesson to be drawn from this Court's gender discrimination cases, therefore, is that government is not precluded from relying on all demonstrable norms in adopting gender classifications. The stereotypes condemned by this Court's cases involved "archaic" assumptions and "outdated misconceptions" about men and women (*Craig v. Boren*, 429 U.S. 190, 198-99 (1976)) that were characteristic of the "role-typing society has long imposed" (*Stanton v. Stanton*, 421 U.S. 7, 15 (1975)), such as the stereotypes that "female spouses . . . would normally be dependent upon their husbands," *Weinberger v. Weisenfeld*, 420 U.S. 636, 643 (1975), that only "male workers' earnings are vital to the support of their families," *id.*, or that "the female [is]

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(1975); *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973); *Wisconsin v. Yoder*, 406 U.S. 205, 234-35 (1972).

[26]Although these two cases involve classifications benefiting women, the standard for judging the constitutionality of gender classifications does not vary with the sex of the class benefited or the nature of the proffered justification. *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 723, 724 n.9, 728.

destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." *Stanton v. Stanton*, 421 U.S. at 14-15.

Thus, in reviewing the constitutionality of a gender classification, the role of the courts "is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 725-26. Where the decision to utilize the challenged classification was not made "'unthinkingly' or 'reflexively'" as "the '"accidental by-product of a traditional way of thinking about females,"'" *Rostker v. Goldberg*, 453 U.S. 57, 72, 74 (1981), but instead "realistically reflects the fact that the sexes are not similarly situated in certain circumstances," *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469 (1981) (plurality opinion), the classification will be upheld, even if its rationale cannot be said to apply with precision to every individual subject to it. *Id.*; *Rostker v. Goldberg*, 453 U.S. at 78; *Parham v. Hughes*, 441 U.S. 347, 354 (1979) (plurality opinion); *Schlesinger v. Ballard*, 419 U.S. at 508.

The VWIL program and its methodology are constitutional under these principles. Unlike the archaic and harmful stereotypes condemned in this Court's cases, VWIL is not based upon any outdated notions about the proper role of women in society. Quite the contrary, VWIL is founded on the principle that women's place in "the marketplace and the world of ideas" -- and in the military -- is the *same* as that of men, but that student demand and developmental norms make VWIL's methodology a more effective and practicable means of maximizing opportunities for the development of confident and successful women leaders. These conclusions reflect the thinking and experience of principled and committed educators, individuals who have

dedicated their lives to the education of women.

Plainly, therefore, VWIL is not founded on impermissible stereotypes that "deprive[] persons of their individual dignity and den[y] society the benefits of wide participation in political, economic, and cultural life." *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984). In fact, VWIL's fundamental premise is the very antithesis of the stereotypes rejected by the Court in the past. VWIL rightly assumes that women can and will achieve success and leadership in business, politics, and the military to the same extent as men, and it is thoughtfully designed with the aid of modern scholarship and experienced educators to ensure that its graduates succeed in attaining those goals.

The foregoing discussion demonstrates the complete inaccuracy of petitioner's contention (U.S. Br. 40) that VMI and VWIL perpetuate the stereotype that "men, and not women, are fit to be strong leaders in the military and other fields." Petitioner attempts to analogize this case to *Mississippi University for Women v. Hogan*, but comparing VWIL to the school of nursing at issue in *Hogan* is nothing short of preposterous. That school fostered the outdated stereotype that nursing is a "women's" profession; VWIL, by contrast, cannot plausibly be said to foster the stereotype that women are not fit for leadership. Every woman who enrolls in VWIL is *required* to participate in ROTC so as to be prepared to assume a military leadership position, and everything about the VWIL program, including its mission, its curriculum, its co-curricular activities, its rigorous physical and mental regimen, and even its name, emphasizes the program's overarching goal of creating bold, effective women leaders.

It is equally false to suggest (U.S. Br. 24-25) that VMI sends the message that women are unfit for a rigorous military or similar career. VWIL's rigorous program for developing tough and independent leaders unequivocally

demonstrates Virginia's belief that women can and will attain leadership positions both in the military and elsewhere. Indeed, VMI, VWIL, and Virginia's public coeducational ROTC programs, including the coeducational Corps of Cadets at VPI, all provide precisely the same opportunity for students to pursue a military career. The district court specifically found that "nothing about the ROTC programs at VMI is unique to VMI other than the absence of women," and non-VMI students perform marginally *better* than VMI students in their ROTC programs. Pet. App. 116a-117a, 119a.[27] In short, there is no basis for petitioner's suggestion that women at VWIL will have less of an opportunity for a military career than men at VMI.

Petitioner also appears to contend (U.S. Br. 41-42) that the States are precluded from taking into account demonstrated differences among students in their respective educational needs when such differences "may themselves result from historical sex-based bias," because the law must not "'reinforce patterns of historical discrimination.'" Even if some of these demonstrable differences were shown to be the product of past discrimination -- a showing that petitioner has not made in this case -- it would hardly follow that educators must ignore these real differences in formulating programs of public education. Instead, the approach most in keeping with the Constitution's mandate of equal opportunity would be precisely that followed by the MBC Task Force here, namely, to develop programs that are designed to *overcome* and *eliminate* any lingering effects of societal stereotyping by developing self-confident graduates

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[27]The military's ROTC programs do not utilize adversative training methods, and it is not necessary for students to be exposed to those methods or to the other aspects of the VMI program in order to succeed in ROTC and the military. Pet. App. 67a, 118a.

of both sexes who are equally well-equipped to seek and obtain leadership positions in all facets of American society, regardless of discredited notions about which gender is better suited to a particular job.

Indeed, petitioner's contrary argument is directly at odds with this Court's recognition that overcoming past discrimination against women is a legitimate and important state objective.[28] If, as petitioner contends, government is precluded from recognizing the lingering effects of discrimination and taking steps to counteract those effects based on the expert advice of experienced professionals, *no* gender classification aimed at compensating for past discrimination could survive constitutional attack. Petitioner states (U.S. Br. 45 n.32) that single-sex education may be justified by a "compensatory purpose," but that statement is impossible to reconcile with petitioner's strident rejection of the proposition that Virginia may take action in response to demonstrable differences in psychological and behavioral norms that may be attributable to societal influences.

The findings and expert evidence in the record demonstrate that single-sex education tends to *reduce* the effects of societal stereotyping on both men and women by making students "more likely to take the risk of choosing a career normally associated with the other sex," Pet. App. 226a, and that VWIL will be *more* effective than an adversative-type program at preparing most women students to assume leadership roles in modern society. *Id.* at 27a, 63a-64a, 73a-74a. If anything, therefore, it is *petitioner*, not respondents, who would "restrict men and women to socially assigned roles" by depriving women of the leadership development opportunities made possible through the VWIL

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[28] *E.g.*, *Mississippi Univ. for Women v. Hogan*, 458 U.S. at 728; *Califano v. Webster*, 430 U.S. at 317.

program. Petitioner's dismissive attitude toward the rigor and effectiveness of the VWIL program is not only contrary to the record and findings below; it is insulting to the dedicated experts in women's education who created the program and the more than 40 young women who have already acted upon their desire to benefit from VWIL and its unique and challenging educational experience.

C. The Equal Protection Clause Does Not Require That Single-Sex Educational Programs Be Identical In All Respects

Petitioner contends (U.S. Br. 42-44) that VWIL is an inadequate remedy because it denies opportunity to any individual woman who might be qualified for and might prefer VMI's methodology. In effect, petitioner's argument is that a State cannot offer the admitted benefits of single-sex education to students of both genders if there is even one student who would prefer the program available to the other gender. That argument is without merit.

In the first place, as a factual matter it is simply not true that women are denied the educational benefits afforded to men at VMI. All of the academic offerings at VMI are available to women at other public institutions in Virginia, and VWIL is designed to provide the same educational benefits and produce the same educational outcomes as VMI. The courts below found that it will achieve that goal. Moreover, those women who might prefer VMI's adversative method could not obtain it in any event, because there is insufficient demand to permit implementation of that methodology in a separate program for women and because, as the courts below found, VMI (or any other school) would be compelled to eliminate or modify drastically that methodology in a coeducational setting. *See infra* pp. 43-47; Va. Br. 33-36, 43-45.

Second, petitioner's argument would, as a practical mat-

ter, entirely preclude state and local governments from funding single-sex educational programs of any kind for students of either gender, no matter how beneficial and important those programs may be to some students.[29] There will inevitably be some differences between parallel educational programs, whether in location, faculty, alumni, physical facilities, reputation, history, traditions, curriculum, size, methodology, or quality of student body. Recognizing this reality, the court of appeals held that the Constitution is satisfied as long as the educational benefits and outcomes provided by the parallel programs are substantively comparable, and found that VMI and VWIL satisfy that high standard. If, however, as petitioner contends, the existence of *any* difference deemed material by *any* student is sufficient to require invalidation of a single-sex admissions policy, public single-sex education becomes impossible.[30]

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[29]Petitioner reluctantly suggests (U.S. Br. 45 n.32) that single-sex education "may" be constitutional in furtherance of a "'compensatory purpose.'" In *Hogan*, however, this Court rejected that justification absent a "showing that women lacked opportunities to obtain training in the field of nursing or to attain positions of leadership in that field." 458 U.S. at 729. Women now participate fully and successfully at all levels of the educational system. Indeed, more women than men attend and graduate from college, and the percentage of high school graduates going on to college is higher for women than for men. U.S. Dep't of Education, National Center for Education Statistics, Digest of Education Statistics 176, 185, 188, 250 (1995). Petitioner's reluctance to endorse the "compensatory" rationale for single-sex education is thus amply justified.

[30]Moreover, direct and indirect public financial assistance (including tax exemptions) for private single-sex schools or for students attending those schools would likely be unavailable as well. This Court made clear in *Norwood v. Harrison*, 413 U.S. 455, 465 (1973), that "'a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.'" Thus, government

[Footnote continued on next page]

Petitioner's insistence on an absolutely precise means-end fit is particularly inappropriate in the context of education. Educational programs must of necessity be designed to accommodate group needs and preferences rather than the desires of individual students. *See* Pet. App. 172a; I Tr. 702 (I JA 949); II Tr. 697. Petitioner's approach would preclude innovative attempts by public schools to respond to demonstrable needs in a wide variety of circumstances, including all-girls' math and science classes, special single-sex programs for inner-city youths, and the like (*see* Va. Br. 39-41; Br. *Amicus Curiae* of Women's Schools Together, Inc., *et al.*), merely because the behavioral or psychological norms justifying the need for such programs are not applicable in *every* individual instance. Acceptance of petitioner's claim that the Constitution precludes reliance on any characteristics not uniformly applicable on gender lines would thus serve only to deny valuable opportunity to numerous students without providing concrete benefits to anyone. The impact of this rigid doctrine would, moreover, be felt most severely by students from economically and socially disadvantaged backgrounds, because it is precisely

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[Footnote continued from previous page]

could be barred from providing financial aid to students attending private single-sex schools if it could not maintain those schools itself. *See* Br. *Amicus Curiae* of Mary Baldwin College at 22-25. Petitioner cites *Blum v. Yaretsky*, 457 U.S. 991 (1982), and *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) for the contrary proposition (*see* U.S. Br. 45 n.31), but those cases hold only that public aid does not turn private entities into state actors or render the government liable for the actions of private parties. They do not contradict *Norwood*'s ban on public financial assistance to private organizations whose discriminatory admissions policies would violate the Constitution if practiced by the government.

those students who can often benefit most from a single-sex education and yet are least likely to be able to afford a private single-sex college. *Id.*; Pet. App. 71a, 74a.

In any event, petitioner is simply wrong as a matter of law in suggesting that a classification is invalid if there are any members of one gender as to whom the classification is not accurate. This Court has never held that there must be an absolutely precise fit between a gender-based classification and the interests served by it. In *Schlesinger v. Ballard*, for example, as noted above, the Court upheld a gender classification even though the Government had made no showing that the generalization supporting it was true in every instance. *See* 419 U.S. at 508-10 & n.13.[31]

Petitioner identifies no authority to the contrary. Instead, it cites cases invalidating gender classifications based on "'archaic'" and "'outdated'" assumptions or "'stereotypical

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[31]Other cases are to the same effect. *E.g.*, *Heckler v. Mathews*, 465 U.S. 728, 749 & n.15 (1984) (approving gender classification justified by need to protect individuals who "may reasonably be assumed" to have relied on prior law, without requiring proof that all of the individuals so benefited had relied or that all of the excluded individuals had not); *Rostker v. Goldberg*, 453 U.S. 57, 81 (1981) (rejecting challenge to exclusion of women from the draft even though "in the event of a draft of 650,000 the military could absorb some 80,000 female inductees"); *Califano v. Webster*, 430 U.S. at 318 (upholding higher social security benefits for women because "women . . . have been unfairly hindered from earning as much as men," without requiring proof that each woman so benefited had suffered discrimination or that each excluded man had not); *see also Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 579, 582-83 (1990) (classification need not be accurate "in every case" to survive intermediate scrutiny as long as it will, "in the aggregate," advance the underlying objective), *overruled in other part on other grounds, Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995).

notions'" containing at most a "'shred of truth.'" U.S. Br. 43 n.29; *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1427 n.11 (1994). As explained above, the differences between VMI and VWIL are not based on such impermissible stereotypes, but are instead predicated on the expert knowledge, advice, and research of highly regarded professional educators and social scientists. The cases cited by petitioner are therefore inapposite.

Moreover, none of the cases cited by petitioner purports to require the degree of tailoring that petitioner seeks. The classification invalidated in *Craig v. Boren*, 429 U.S. 190 (1976), for example, was highly imprecise. *Id.* at 201-03 & n.16. Likewise, most of the empirical evidence in *J.E.B.* refuted the existence of *any* correlation between gender and juror attitudes. 114 S. Ct. at 1426-27 & n.9. *See also Hogan*, 458 U.S. at 731 (record was "flatly inconsistent" with proffered justification); *Frontiero v. Richardson*, 411 U.S. 677, 689 (1973) (plurality opinion) ("no concrete evidence" supporting proffered justification).

Petitioner's argument that the justifications for gender classifications must be applicable in every individual instance is, in effect, an attempt to incorporate the narrow-tailoring requirement of strict scrutiny into the intermediate scrutiny context. This Court's precedents do not permit that approach, however, and its adoption would effectively overrule numerous decisions of this Court and invalidate scores of federal and state laws and programs.

III. THE EQUAL PROTECTION CLAUSE DOES NOT MANDATE COEDUCATION AS THE ONLY PERMISSIBLE REMEDY IN THIS CASE

Petitioner contends that VMI must become coeducational

in order to provide a "complete remedy." U.S. Br. 21.[32] The record and findings below conclusively demonstrate, however, that VWIL in fact provides a far more effective and complete remedy than a coeducational VMI would offer. Most importantly, VWIL extends the proven and substantial benefits of a single-sex college education to women. Petitioner's preferred remedy, by contrast, would deny those benefits to both women and men.

In addition, as both courts below found, neither women nor men would receive the benefits of VMI's adversative method if VMI were to become coeducational, because the need to attract and accommodate a different student population would necessarily lead to fundamental changes in that method. *See* Va. Br. 16-19, 34-36. Petitioner disagrees with that factual finding, but its attempt to reargue the facts in this Court, armed only with its own opinions, is both improper and unavailing.

For example, petitioner ignores the record in asserting (U.S. Br. 27-28) that the creation of privacy rights on gender grounds would not affect VMI's methodology. The VMI method operates by breaking down and eliminating distinctions between students and building group identity within the entire class by subjecting everyone to exactly the

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[32]Petitioner also claims (U.S. Br. 21, 26) that the "presumptive remedy" for an invalid exclusion is elimination of the benefits being afforded to the unconstitutionally favored class. The Court's equal protection cases are to the contrary. *See, e.g., Heckler v. Mathews*, 465 U.S. at 738-39 & n.5. Petitioner relies on *Orr v. Orr*, 440 U.S. 268, 283 (1979) (*see* U.S. Br. 21), but that case merely holds that a State cannot maintain a gender-based classification where its purposes are "as well served by a gender-neutral classification." Because Virginia's objective of providing the option and benefits of a public single-sex college education is not served at *all* by a gender-neutral classification, *Orr* is inapposite.

same standards and to the constant scrutiny of all other students. Pet. App. 6a, 23a, 191a-92a, 194a, 197a, 233a, 237a. A system of separate privacy rights within each class for groups of students defined by their gender would thus be directly contrary to central attributes of the VMI method. The courts below found that the absence of privacy is "essential to the leveling process," *id.* at 6a, but coeducation would frustrate that process by separating VMI's student body into two distinct gender groups, each continually asserting privacy rights as against the other.

For the same reasons, petitioner's claim (U.S. Br. 28-29) that VMI's method would not be affected by the adoption of "ability groupings" or other "accommodations" for the physical differences between men and women is simply false. The courts below found that VMI's egalitarianism, including its imposition of identical physical standards on all students, was an essential element of its program. Pet. App. 146a-47a, 237a-38a.[33] That egalitarian ethic would be severely undermined by abandonment of uniform physical standards, causing male and female students to "perceive the treatment of them as unequal." Pet. App. 147a.

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[33]Petitioner suggests (U.S. Br. 29) that VMI already accommodates physical differences, because many students fail the physical fitness test at least once. But VMI does not purport to eliminate physical differences among students. Instead, the crucial attribute of VMI's methodology is its insistence on imposing the same standards, including the same physical fitness test, on all students. All students are subject to the same fitness test and suffer the same consequence for failure to pass it (namely, a failing grade on that portion of the semester's physical fitness course). I Tr. 316-17 (I JA 564-65). The fact that participants in varsity sports miss a fraction of the physical training program while at practice is beside the point, because they are still subject to the same fitness standards and they participate in precisely the same activities at all other times. I Tr. 111-12 (I JA 359-60); Pet. App. 195a.

Petitioner makes no effort to refute the factual findings below that VMI's adversative method could not accommodate the effects of the cross-gender harassment that would result from an attempt to employ that method in a coeducational setting. Instead, petitioner erroneously contends that the court of appeals' reliance on this fact is "impermissible" because it reflects "'romantic paternalism'" about what behavior is "unseemly." U.S. Br. 30.

The district court found, and the court of appeals agreed, that the adversative system would necessarily undergo fundamental changes if VMI were to become coeducational. Pet. App. 6a, 147a, 227a, 238a-39a. That finding was not based on an assumption that cross-gender confrontation is "unseemly" but on expert testimony and the experience of the U.S. military academies, which demonstrated that the reality of cross-gender interactions and relationships between college students would inevitably lead to substantial changes in the ethic of absolute egalitarianism and the intentional harassment and intimidation that characterize the adversative method. *Id.*; *see* Va. Br. 34-36. No matter how much petitioner would like to pretend that college students always interact with members of the opposite sex in precisely the same way that they interact with members of the same sex, the record and findings below (as well as common sense) are to the contrary.[34] Moreover, petitioner's attempt to dismiss the seriousness of these concerns

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[34]Even petitioner's education expert conceded that aspects of the VMI experience would be "deeply affected" by coeducation and that the admission of women would be "a pretty dramatic clientele change" that would necessarily produce "major . . . consequences, for the academic system, for the athletic system and for the lifestyle system." I Tr. 365, 368, 399 (I JA 613, 616, 647). He also stated that "[t]hese [changes] are not insignificant and in no way would I diminish their importance." I Tr. 365 (I JA 613).

is, at best, disingenuous, because petitioner affirmatively argued below that the adversative method would have to be altered so as to avoid "harassment" deemed inappropriate for women. II JA 101.[35]

Petitioner also contends (U.S. Br. 27, 31-32) that VMI would not be "destroy[ed]" by coeducation, and points to the transformation of the service academies from single-sex to coeducational institutions. It is no doubt true that VMI could survive as a college if it were to admit women. The central point, however, is that it would no longer offer the benefits of single-sex education, nor would it be able to retain the adversative system. VMI would instead become nothing more than a pale shadow of the service academies, far less attractive to students because unable to guarantee free tuition, student pay, or an active-duty military commission, and indistinguishable in its methodology from the coeducational Corps of Cadets and ROTC program already available at VPI. Pet. App. 173a; I DX 58 at 25 (I JA 1757; L. 225).

Indeed, far from supporting petitioner's contentions, the experience of the service academies further bolsters the conclusion that VMI's adversative methodology would not

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[35]Petitioner also insisted that VMI would have to enforce "a zero tolerance policy in regard to acts of gender discrimination and harassment committed by cadets," that VMI would be required to "make available to all cadets counseling services relating to problems of discrimination or harassment on the basis of gender," and that "[l]ying about any violations of regulations governing gender discrimination or harassment shall be treated as an Honor Code violation." II JA 101, 103-04. Petitioner has yet to explain how the extreme harassment and intimidation inherent in the adversative method could be implemented in a coeducational setting without creating a "hostile environment" constituting impermissible sexual harassment.

survive coeducation. *See* Va. Br. 34-35; Pet. App. 172a n.8, 235a-41a. Approval of petitioner's arguments would thus deprive both women and men of an educational option they now have -- namely, a single-sex college education focused on leadership, character development, and military training -- without extending to them any educational opportunity that is not already available elsewhere. Petitioner's insistence that VMI must admit women (and, implicitly, that VWIL must admit men) is thus an attempt to lessen diversity in public higher education by mandating conformity and coeducation. The Constitution should not be construed to incorporate petitioner's view that coeducation is the only acceptable method for educating college students in public institutions.

IV. STRICT SCRUTINY IS NOT APPLICABLE IN THIS CASE

For the first time in this case, petitioner asserts (U.S. Br. 17-18, 33-36) that gender-based classifications should be subjected to strict judicial scrutiny. This Court should decline petitioner's untimely invitation to address that issue, which was neither pressed nor passed upon below.

A. The Issue Of Strict Scrutiny Issue Is Not Properly Presented

Petitioner has waived the issue of strict scrutiny by failing to raise that issue at any stage of this case prior to the filing of its opening brief on the merits in this Court. Indeed, in the district court, petitioner affirmatively scorned the very position it now advances, asserting that "the United States has never argued that this Court should abandon the Supreme Court's well-settled adherence to the intermediate standard of review in gender classification cases." R. 88, at 3. Petitioner announced that the Government's position was "*unequivocally* that the appropriate standard in this case is 'intermediate scrutiny,' and that a classification

based on gender must be 'substantially related to the achievement of a sufficiently important governmental objective.'" *Id.* (emphasis added).

Petitioner consistently adhered to that position in the court of appeals.[36] And in reliance on petitioner's concessions, the courts below did not address the question of strict scrutiny at all. That question is, therefore, not properly before the Court. *Zobrest v. Catalina Foothills School Dist.*, 113 S. Ct. 2462, 2466 (1993); *Yee v. City of Escondido*, 503 U.S. 519, 532-33 (1992); *Demarest v. Manspeaker*, 498 U.S. 184, 188-189 (1991).

Petitioner's attempt to inject the issue of strict scrutiny at this stage of the proceedings is particularly inappropriate given the contrary position advanced by petitioner the last time the case reached this Court. In opposing certiorari at the liability stage, petitioner affirmatively represented to this Court that "*Hogan* supplies the test for determining whether VMI's male-only admissions policy violates the Equal Protection Clause of the Fourteenth Amendment." 92-1213 Br. in Opp. 9.[37] Petitioner should not be permitted an eleventh-hour change in its legal posture after insisting on a contrary position for more than five years of litigation at all levels of the federal judiciary.

B. Strict Scrutiny Should Not Apply To Gender Classifications

As petitioner has observed, intermediate scrutiny is one of this Court's "'firmly established principles' for evaluat-

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[36] *See* 91-1690 Gov't C.A. Reply Br. 4; *see also* 94-1667 Gov't C.A. Br. 8; 91-1690 Gov't C.A. Br. 21, 23-29.

[37] Petitioner reaffirmed that position at the certiorari stage after the remedial decision below. *See* 94-1941 Pet. 19; 94-1941 Pet. Reply Br. 5-10; 94-2107 Cross-Pet. Br. in Opp. 5 & n.2.

ing claims of gender discrimination." R. 88 at 3. Indeed, this Court has applied that standard in every gender-based equal protection case since at least *Craig v. Boren*, 429 U.S. 190 (1976). Adoption of strict scrutiny for gender classifications would require the Court to overrule numerous prior decisions applying intermediate scrutiny to uphold gender-based classifications.[38]

"[A]ny departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Petitioner does not even attempt to offer any "special justification" for its last-minute request that the Court reject two decades of constitutional jurisprudence.

Instead, petitioner merely confirms the inappropriateness of strict scrutiny for gender classifications by seeking to exempt the military from the impact of that standard. U.S. Br. 34 n.23. Petitioner's advocacy of a form of qualified or selective strict scrutiny is wholly incompatible with this Court's equal protection jurisprudence, which demonstrates that "inherently suspect" classifications may not be treated as suspect only some of the time. *See Adarand Constructors, Inc. v. Pena*, 115 S. Ct. at 2113; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989). Deference to military affairs would not insulate the military's widespread disparate treatment of men and women from strict scrutiny any more than it would permit the military to reinstitute racially segregated units. *See Rostker v. Goldberg*, 453 U.S. at 69-71 (the military is subject to the same standard applied to other gender classifications, and "deference [to military decisionmaking] does not mean abdication").

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[38] *E.g.*, *Heckler v. Mathews*, 465 U.S. 728 (1984); *Michael M. v. Superior Ct. of Sonoma Cty.*, 450 U.S. 464 (1981); *Parham v. Hughes*, 441 U.S. 347 (1979); *Califano v. Webster*, 430 U.S. 313 (1977); *Schlesinger v. Ballard*, 419 U.S. 498 (1975).

In truth, intermediate scrutiny has achieved the worthy and balanced goal of invalidating most governmental line-drawing based on gender while preserving those relatively few gender distinctions that are supported by legitimate and important reasons. Adoption of strict scrutiny would serve only to bring into question the constitutionality of those remaining gender classifications that do serve important and valid governmental objectives, particularly in the military, prisons, and education. Petitioner fails to identify any need for achieving that result. Indeed, petitioner's change of heart regarding the standard for judging gender classifications appears to reflect nothing more than petitioner's implicit recognition that public single-sex education like that at VMI and VWIL can and should survive intermediate scrutiny.[39]

CONCLUSION

Virginia has developed a higher education program that includes recognition of the fact, endorsed widely by experts in education, that some students benefit greatly from single-sex colleges and develop into successful, confident adults more readily in such an environment. The Equal Protection Clause does not prohibit States from offering that opportunity to its young women and men in parallel programs developed by experts to meet the needs of young people. The judgment of the court of appeals should be affirmed.

December 15, 1995 Respectfully submitted.

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[39]In addition to the reasons set forth above, strict scrutiny is also inappropriate in the gender context for the reasons set forth in the briefs *amicus curiae* of the State of Wyoming, *et al.*, and the Independent Women's Forum, *et al.*

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In the Supreme Court of the United States

OCTOBER TERM, 1995

COMMONWEALTH OF VIRGINIA, ET AL.,
CROSS-PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE CROSS-RESPONDENT

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44 pp

QUESTION PRESENTED

Whether the exclusion of women from the Virginia Military Institute, based solely on their sex, violates the Equal Protection Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Constitutional provision involved	2
Statement	2
Summary of argument	8
Argument:	
I. VMI's admissions policy is unconstitutional because it excludes qualified women from a unique educational opportunity solely because of their sex	12
A. The unconstitutionality of VMI's policy is clear	12
1. VMI's policy substantially harms women	13
2. Established law compels invalidation of VMI's policy	15
B. Cross-petitioners have not established that the actual reasons for excluding women from VMI are legitimate	18
C. Cross-petitioners' post-hoc rationalizations also do not justify excluding women from VMI	20
1. Virginia has no state policy of advancing diversity in higher education through the provision of single-sex, military-style education	21
2. Virginia cannot enhance the diversity of choices in higher education for men alone	23
3. VMI need not exclude women in order to offer "a distinctive program of military-style education"	28

Argument—Continued: Page

II. The legality of private single-sex education would be unaffected by a holding that VMI's admissions policy is unconstitutional 35

Conclusion 38

TABLE OF AUTHORITIES

Cases:

Blum v. *Yaretsky*, 457 U.S. 991 (1982) 37
City of Richmond v. *J.A. Croson Co.*, 488 U.S. 469 (1989) 23
Dothard v. *Rawlinson*, 433 U.S. 321 (1977) 35
Faulkner v. *Jones*, 51 F.3d 440, motion to stay mandate denied, 66 F.3d 661 (4th Cir.), application for stay of enforcement denied, No. A-127 (Aug. 11, 1995), cert. dismissed, 116 S. Ct. 331, cert. denied, 116 S. Ct. 352 (1995) 13-14, 33, 34
Garrett v. *Board of Educ.*, 775 F. Supp. 1004 (E.D. Mich. 1991) 15
International Bhd. of Teamsters v. *United States*, 431 U.S. 324 (1977) 35
International Union, United Automobile Workers v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991) 16
J.E.B. v. *Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994) 15, 17
Kirstein v. *Rector and Visitors of Univ. of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970) 15, 17, 19, 25
McCabe v. *Atchison, T. & S.F. Ry.*, 235 U.S. 151 (1914) 33
Michael M. v. *Superior Court of Sonoma County*, 450 U.S. 464 (1981) 16
Mississippi Univ. for Women v. *Hogan*, 458 U.S. 718 (1982) 4, 9, 17, 18, 19, 24, 25
Missouri ex rel. Gaines v. *Canada*, 305 U.S. 337 (1938) 33
Moose Lodge No. 107 v. *Irvis*, 407 U.S. 163 (1972) 37
Newberg v. *Board of Pub. Educ.*, 478 A.2d 1352 (Pa. Super. Ct. 1984) 15
Norwood v. *Harrison*, 413 U.S. 455 (1973) 37

Cases—Continued: Page

Regents of Univ. of California v. *Bakke*, 438 U.S. 265 (1978) 23
Rendell-Baker v. *Kohn*, 457 U.S. 830 (1982) 36
Rostker v. *Goldberg*, 453 U.S. 57 (1981) 16
Runyon v. *McCrary*, 427 U.S. 160 (1976) 36
Schlesinger v. *Ballard*, 419 U.S. 498 (1975) 16
Shelley v. *Kraemer*, 334 U.S. 1 (1948) 36
Sweatt v. *Painter*, 339 U.S. 629 (1950) 34
United States v. *Hinds County School Bd.*, 560 F.2d 619 (5th Cir. 1977) 15
VMI v. *United States*, cert. denied, 113 S. Ct. 2431 (1993) 8
Vorchheimer v. *School Dist.*, 532 F.2d 880 (3d Cir. 1976), aff'd by an equally divided Court, 430 U.S. 703 (1977) 15
Weinberger v. *Wiesenfeld*, 420 U.S. 636 (1975) 18
Wengler v. *Druggists Mutual Ins. Co.*, 446 U.S. 142 (1980) 17, 24
Williams v. *McNair*, 316 F. Supp. 134 (D.S.C. 1970), aff'd mem., 401 U.S. 951 (1971) 19
Wygant v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986) 23

Constitution, statutes and regulations:

U.S. Const. Amend. XIV (Equal Protection Clause) 2, 3, 6, 12, 31, 36
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 16, 35
Education Amendments of 1972, Tit. IX, 20 U.S.C. 1681 *et seq.* 27, 35, 36
20 U.S.C. 1681 27
20 U.S.C. 1681(a) 36
20 U.S.C. 1681(a)(1) 36
42 U.S.C. 1981 36
1995 Va. Acts ch. 582 (to be codified at Va. Code Ann. § 22.1-212.1:1 (Michie Supp. 1995)) 27
34 C.F.R.:
Section 106.3 27
Section 106.34(c) 27
Section 106.34(e) 27

Miscellaneous: Page

Dianne Avery, *Institutional Myths, Historical Narratives, and Social Science Evidence: Reading the "Record" in the Virginia Military Institute Case*, 5 S. Cal. Rev. L. & Women's Stud. (manuscript) (forthcoming Spring 1996) 18

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-2107

COMMONWEALTH OF VIRGINIA, ET AL.,
CROSS-PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE CROSS-RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals regarding liability (*VMI I*) (Pet. App. 134a-157a),[1] is reported at 976 F.2d 890. The opinion of the district court regarding liability (Pet. App. 158a-245a) is reported at 766 F. Supp. 1407. The opinion of the court of appeals regarding remedy (*VMI II*) (Pet. App. 1a-52a) is reported at 44 F.3d 1229. The opinion of the district court regarding remedy (Pet. App. 53a-131a) is reported at 852 F. Supp. 471.

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[1] References to "Pet. App." are to the appendix to the petition for a writ of certiorari filed in *United States* v. *Commonwealth of Virginia*, No. 94-1941 (filed May 26, 1995).

JURISDICTION

The judgment of the court of appeals regarding liability (*VMI I*) was entered on October 5, 1992. A petition for rehearing was denied on November 19, 1992. Pet. App. 157a. A petition for a writ of certiorari was denied on May 24, 1993. Pet. App. 132a-133a. The district court on remand approved a remedy. The United States appealed to challenge the remedy as inadequate, and cross-petitioners cross-appealed to challenge the original finding of liability. The judgment of the court of appeals regarding remedy (*VMI II*) was entered on January 26, 1995. The court of appeals voted sua sponte not to rehear the case en banc, and entered an order to that effect on April 28, 1995 (Pet. App. 246a-257a). On April 18, 1995, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 26, 1995. The United States filed a petition for a writ of certiorari on May 26, 1995 (No. 94-1941). The cross-petitioners filed a conditional cross-petition for a writ of certiorari on June 23, 1995. This Court granted the petition and cross-petition on October 5, 1995. 116 S. Ct. 281. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

This brief addresses cross-petitioners' challenge (No. 94-2107) to the court of appeals' *VMI I* decision regarding liability, in which that court held that the

sex-based exclusion of women students from the Virginia Military Institute (VMI) violates the Equal Protection Clause of the Fourteenth Amendment. We earlier filed a brief in support of our challenge (No. 94-1941) to the court of appeals' *VMI II* decision approving as a remedy for that violation the establishment of a new, separate college program that would exclude men. The procedural and factual background of the case is set forth in the Statement in our brief in No. 94-1941, at 2-15. That Statement is supplemented below with a further description of the liability holdings.

1. The proceedings in the district court were bifurcated. After a trial regarding liability, the district court on June 14, 1991, entered judgment in favor of cross-petitioners, holding that VMI's exclusion of women did not violate the Equal Protection Clause. Pet. App. 158a-245a. The district court recognized and found that "[t]he system of education at VMI is not offered elsewhere in the United States," *id.* at 192a,[2] and that women therefore "are denied a unique educational opportunity that is available only at VMI," *id.* at 218a.[3]

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[2] The district court acknowledged that the Virginia Polytechnic Institute and State University (VPI), although it has a coeducational residential program offering military-style training, is a "dramatically different institution[]" offering "dramatically different experiences" from those offered at VMI. Pet. App. 192a.

[3] Women also have no opportunity to compete for the VMI State Cadetships, a group of state-funded college scholarships that the Commonwealth of Virginia awards exclusively to men who attend VMI. The Commonwealth awarded $147,104 in VMI-designated scholarship funds to 35 male VMI cadets in 1990-1991. Pet. App. 189a.

The court held, however, that VMI's exclusion of women met the constitutional test for sex-based classifications set forth in *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718 (1982). See Pet. App. 164a-165a. Under that test, VMI's policy is unconstitutional unless cross-petitioners can show that that exclusion "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." 458 U.S. at 724 (internal quotation marks omitted).

During the proceedings regarding liability, the Commonwealth of Virginia denied that VMI's discriminatory policy fostered *any* state objectives.[4] Counsel for the VMI Foundation, Inc., and the VMI Alumni Association, private organizations that intervened as defendants, represented VMI, its superintendent and its Board of Visitors at trial. Those defendants asserted two "governmental" objectives allegedly supporting VMI's discriminatory exclusion of women: "educating cadets for lives as 'citizen-soldiers,'" and fostering "system-wide diversity by providing an opportunity for single-sex education and by providing a distinctive program of military-style

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[4] The Governor stated in his Answer that "no person should be denied admittance to a state supported school because of his or her gender." Pet. App. 142a (L. 7-8). The Virginia Attorney General concluded that the "positions of the Governor and the Commonwealth" were "inseparable." *VMI I* C.A. App. 134 (L. 25); see Pet. App. 142a. Because neither the Governor of Virginia nor the Commonwealth defended VMI's sex-based exclusionary policy at the trial on liability, *id.* at 142a, 160a, the Commonwealth obtained a stay of the proceedings against it on the condition that it would be bound by any liability determination, *id.* at 160a.

education." R. 152 (VMI Defendants' Proposed Findings of Fact and Conclusions of Law (liability phase) (Apr. 26, 1991)), at 114 (¶ 28), 115 (¶ 38).

The district court determined that system-wide "diversity in education" is a "legitimate objective" for a State to pursue, Pet. App. 167a; see *id.* at 159a, and that, because "some students, both male and female, benefit from attending a single-sex college," single-sex education is a constitutionally legitimate form of diversity within an educational system, *id.* at 168a. It also concluded that "VMI's unique method of instruction" contributes to diversity in Virginia's educational offerings. *Id.* at 176a.[5]

The district court next determined that VMI's exclusion of women was substantially related to the achievement of diversity in Virginia's higher education system, because "[VMI's] single-sex status would be lost, and some aspects of the distinctive method would be altered if it were to admit women." Pet. App. 173a. The court noted that "[t]he sole way to attain single-gender diversity is to maintain a policy of admitting only one gender to an institution," *id.* at 167a, and that, "even though some women are capable of all the individual activities required of VMI cadets, a college where women are present would be significantly different from one where only men are present," *id.* at 170a.[6] The court acknowledged

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[5] The district court did not address the asserted interest in educating cadets for lives as citizen-soldiers.

[6] The court found that VMI would have to adopt less stringent physical education requirements for women, even though the court credited "[e]xpert testimony establish[ing] that * * * some women are capable of all of the individual activities

that the successful assimilation of women at West Point shows that, "[w]ithout a doubt, VMI could do likewise." *Id.* at 172a n.8. But "[t]he VMI Board has decided that providing a distinctive, single-sex educational opportunity is more important than providing an education equally available to all." *Id.* at 170a. The court concluded that VMI's desire to avoid the changes that admitting women would bring "provide[s] sufficient constitutional justification for continuing the single-sex policy." *Id.* at 172a.

2. The court of appeals vacated and remanded, holding that VMI's admissions policy violated the Equal Protection Clause. Pet. App. 134a-156a (*VMI I*). The court held that neither prong of the *Hogan* test was satisfied.[7] The Commonwealth of Virginia, the court noted, "failed to articulate an important objective which supports the provision of [VMI's]

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required of VMI cadets." Pet. App. 170a-171a, 233a-235a. The court also found that VMI would have to alter its facilities to allow men and women privacy from the other sex during activities such as undressing and showering, *id.* at 171a, 233a, and that the presence of women would add "a new set of stresses on the cadets," *id.* at 171a.

[7] As a preliminary matter, the court determined that "single-sex education is pedagogically justifiable" for "[b]oth men *and* women" and that "VMI's male-only policy is justified by its institutional mission." Pet. App. 150a-151a. But those conclusions did not answer the question "whether the unique benefit offered by VMI's type of education can be denied to women by the state under a policy of diversity, which has been advanced as the justification and which was relied on by the district court." *Id.* at 151a. The court emphasized that, by "commenting on the potential benefits of single-gender education," the court "d[id] not mean to suggest the specific remedial course that the Commonwealth should or must follow." *Id.* at 155a-156a.

unique educational opportunity to men only." *Id.* at 137a; see *id.* at 155a. The court rejected the district court's attribution to Virginia of the objective of providing single-sex education to promote a diverse array of educational options. *Id.* at 152a-153a.[8] It found that Virginia lacked any "stated policy justifying single-sex education in state-supported colleges and universities"; Virginia's only policy statement "with respect to gender distinctions" in higher education required that its colleges and universities treat students "*without regard to sex, race, or ethnic origin*," *id.* at 153a (emphasis added by court of appeals).[9] The court noted that Virginia has in fact abandoned public single-sex education at every institution of higher education other than VMI. *Id.* at 154a.[10]

The court of appeals also found no substantial relationship between an interest in diversity and the categorical exclusion of women from VMI: Even "[i]f VMI's male-only admissions policy is in furtherance of a state policy of 'diversity,' the explanation of how the policy is furthered by affording a unique educa-

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[8] Cross-petitioners did not assert on appeal, and the court did not consider, the interest in training students for lives as citizen-soldiers.

[9] Moreover, "[t]he lack of a state-announced policy to justify gender classifications is aggravated by the reluctance of the Commonwealth, as a party, and its governor to participate in this case and in this appeal." Pet. App. 153a. Indeed, as the Commonwealth's policy was articulated by the governor, "VMI's single-sex admissions policy *violates* state policy." *Ibid.* (emphasis added).

[10] Several of Virginia's public colleges had previously been single-sex, but "[a]ll Virginia statutes requiring individual institutions to admit only men or women have been repealed." Pet. App. 188a.

tional benefit only to males is lacking. A policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender." Pet. App. 153a-154a.

Cross-petitioners sought review in this Court, which denied certiorari. *VMI* v. *United States*, 113 S. Ct. 2431 (1993) (Pet. App. 132a-133a).[11] After the court of appeals affirmed the decision approving VMI's proposed remedy, the Court granted the United States' petition challenging the remedy and also granted the conditional cross-petition challenging the liability holding. *United States* v. *Commonwealth of Virginia*, 116 S. Ct. 281 (1995).

SUMMARY OF ARGUMENT

The court of appeals applied established equal protection principles to hold that the Virginia Military Institute unconstitutionally excludes women based on their sex. That holding is constitutionally unassailable. The Commonwealth of Virginia reserves VMI for men, and thus provides no opportunity for women to enjoy its benefits. The Commonwealth offers nothing to meet the needs of women who are, but for their sex, qualified for VMI and want to attend. A formal state policy that offers an educational opportunity to men that is not offered to women is presumptively unconstitutional.

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[11] On remand, the district court approved a remedial plan that continues to exclude women from VMI and establishes an all-female Virginia Women's Institute for Leadership (VWIL) at Mary Baldwin College, a private, liberal arts college primarily for women. Pet. App. 53a-131a. The court of appeals affirmed. *Id.* at 1a-52a (*VMI II*). We have addressed that remedial plan in the Brief for the United States in No. 94-1941.

That presumption is especially strong where, as here, the policy not only denies women a valued opportunity, but in doing so relies on and reinforces harmful and archaic sex-role stereotypes. VMI's rigorous, military-style education is renowned, and the Institute's alumni network is an extraordinarily powerful one, especially in historically male-dominated fields. In defending its exclusionary policy, VMI has relied on archaic notions that men are more confident and aggressive than women and has concluded that men alone would therefore want and benefit from VMI's military-style educational method. VMI's exclusion of women echoes and reinforces historical patterns of discrimination and stereotyping that, for most of our history, closed to women the most rigorous educational opportunities and excluded them from leadership roles in business and public life.

Such formal sex-based barriers, and the stereotypes that support them, have no place under our modern Constitution. This Court's equal protection cases squarely reject governmental reliance on the kinds of psychological and sociological generalizations about women and men that cross-petitioners assert. Although the United States believes that strict scrutiny is the correct standard of constitutional review for official discrimination based on sex, the unconstitutionality of VMI's exclusionary admissions policy is evident under intermediate scrutiny as well. Indeed, this Court's decision in *Mississippi University for Women* v. *Hogan*, 458 U.S. 718 (1982), alone compels affirmance of the liability determination in this case. Just as Mississippi could not constitutionally reserve a public nursing school for women based on "a stereotyped view of nursing as an ex-

clusively women's job," so, too, is Virginia's reservation for men of a stereotypically male form of military-style leadership training constitutionally forbidden.

Cross-petitioners have failed to show that VMI's exclusionary admissions policy is necessary to serve any important governmental objective. This Court's cases require that the policy be evaluated with reference to the State's actual goals in employing it. The actual objective of excluding women from VMI when that policy was initiated at the founding of the school in 1839 reflected the assumptions of that time—assumptions that men alone were fit for military and leadership roles. Before this litigation was initiated, Virginia never sought to supply a valid, contemporary rationale for VMI's exclusionary policy. That failure itself renders the VMI policy invalid.

In any event, no current rationale justifies continuing to exclude women from VMI. The only objective cross-petitioners have asserted, post-hoc, is an interest in enhancing the "diversity" of options in Virginia's system of public higher education. As the court of appeals correctly observed, however, Virginia does not in fact have any policy of enhancing diversity by providing single-sex, military-style education. And the court of appeals correctly concluded that, in any event, a policy of diversity in higher education is patently inadequate to justify providing men, but not women, an enhanced diversity of choices.

Cross-petitioners' assertion that a State must be able to provide single-sex education to one sex alone amounts to a contention that single-sex education is constitutional *per se*. This Court in *Hogan* rejected

that view, and instead required an exceedingly persuasive justification in each instance in which a State excludes persons from an educational opportunity based on their sex. Although it is possible that single-sex education for only one sex may be constitutionally justifiable in order to compensate for discrimination that only one sex has suffered, no such rationale is present here. And, contrary to cross-petitioners' contention, the fact that private colleges in Virginia offer single-sex education to women provides no excuse for VMI's policy of excluding women. No other school in Virginia, public or private, provides to women the opportunity they are denied at VMI, and private schools cannot, in any event, alleviate the Commonwealth's constitutional obligation to treat the sexes equally.

VMI need not exclude women in order to continue to offer "a distinctive program of military-style education." It is undisputed that some women can perform all the tasks required at VMI and would thrive under VMI's military-style methodology. Although minor changes in physical training and privacy accommodations would accompany the admission of women, the Commonwealth has no interest in avoiding such changes, and certainly none strong enough to justify the continued exclusion of women. VMI could continue effectively to fulfill its stated mission of educating citizen-soldiers if both qualified men and women were admitted as students.

ARGUMENT

I. VMI'S ADMISSIONS POLICY IS UNCONSTITUTIONAL BECAUSE IT EXCLUDES QUALIFIED WOMEN FROM A UNIQUE EDUCATIONAL OPPORTUNITY SOLELY BECAUSE OF THEIR SEX

A. The unconstitutionality of VMI's policy is clear

The Virginia Military Institute (VMI), a state college,[12] has an admissions policy that bars all women as students solely on account of their sex. The policy excludes women without regard to their actual qualifications. No woman is permitted to experience VMI's unique, military-style educational program, or take advantage of VMI's enormous prestige and alumni network. Cross-petitioners ask this Court to hold that the Equal Protection Clause permits a State to offer a unique and prestigious educational program at a 150-year-old institution of higher education only to men, without offering *any* alternative whatsoever to women.

In our opening brief in No. 94-1941, we argue that the only way to achieve equal protection here is to admit women to VMI, and that the Virginia Women's Institute for Leadership (VWIL) is a patently inadequate and unconstitutional alternative. Cross-petitioners have argued in that case that VWIL

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[12] VMI is one of 15 state institutions of higher education in Virginia. Pet. App. 138a. It is "financially supported by the Commonwealth of Virginia and remains 'subject to the control of the [Virginia] General Assembly.' Va. Code Ann. § 23.92. It is governed by a Board of Visitors, which the Commonwealth expressly charges with prescribing 'the terms upon which cadets may be admitted, their number, the course of their instruction, the nature of their service, and the duration thereof.' Va. Code Ann. § 23-104." *Ibid.*

provides an adequate remedy to women for the unconstitutionality of VMI's admissions policy. Here they make the much more extreme contention that they can continue to operate VMI for men only, without offering any alternative whatever to women. No conceivable theory of equal protection can sustain that proposition.

1. *VMI's policy substantially harms women*

The practical consequences for women of VMI's exclusionary policy are pernicious. The policy deprives women who seek to attend VMI of valued educational benefits—benefits that cross-petitioners themselves have repeatedly characterized as "unique." VMI is a small college offering a rigorous, military-style educational program. It has been successful in "instilling physical and mental discipline, character, and a kind of moral code." Pet. App. 204a. The barracks-centered military program at VMI is unavailable elsewhere in Virginia. See 94-1941 U.S. Br. 2-5, 16, 22.

VMI's policy also excludes women from life-long opportunities, responsibilities, and powerful connections that VMI has long afforded its graduates. VMI's alumni network is "enormously influential," 94-1667 & 94-1717 (*VMI II*) Tr. 1227, especially in the male-dominated fields of engineering, the military, business, and public service, in which VMI graduates most often tend to pursue careers, *id.* at 1228. This case, like the parallel case against the similar exclusionary policy of The Citadel in South Carolina, therefore concerns not only education, but also "wealth, power, and the ability of those who have it now to determine who will have it later." *Faulkner* v. *Jones*, 51 F.3d

440, 451 (Hall, J., concurring), motion to stay mandate denied, 66 F.3d 661 (4th Cir.), cert. dismissed, 116 S. Ct. 331, cert. denied, 116 S. Ct. 352 (1995). See 94-1941 U.S. Br. 2-3, 16, 22-23.

The sex-based distinction at issue in this case is particularly harmful to women because of its reliance on sexual stereotypes. Rejection of sex-stereotyping lies at the core of the equal protection concern with classifications based on sex. VMI's exclusion of women from the Commonwealth of Virginia's military-style leadership educational program communicates the message that, in the Commonwealth's official view, rigorous, military-style training is not appropriate for women. That impermissible state policy is vividly highlighted by cross-petitioners' defense of the exclusion of women in this case, which rests in large part on archaic and overbroad notions about men's and women's personalities and preferences, including the view that men are more confident, aggressive, and suited to hierarchy than women, and that women are more emotional, caring, and interested in marrying than men. See 94-1941 U.S. Br. 37-42.[13] In this context, cross-petitioners' suggestion (Br. 26) that "single-sex education performs

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[13] To invalidate VMI's exclusion of women because it is based on overbroad stereotypes is not to denigrate individuals for whom such stereotypes are accurate, but rather to reject the premise that, merely because stereotypes are true for some individuals, the State has a right to apply them to everyone. Reliance on stereotypes is harmful because it forecloses individual opportunity for persons who do not fit the traditional mold. Such reliance impedes accurate, current assessment of the needs and abilities of individual members of both sexes. See 94-1941 U.S. Br. 40-44 (discussing case law prohibiting reliance on overbroad sex-based generalizations and stereotypes).

a valuable service in uprooting inaccurate stereotypes" is bewildering.

2. *Established law compels invalidation of VMI's policy*

No modern sex discrimination case has upheld a policy of excluding one sex from an educational institution to the advantage of the other.[14] Nor have any of this Court's modern cases accepted sociological or psychological generalizations about men and women as rendering the sexes not similarly situated for equal protection purposes.[15] The Court has found women to be differently situated in the equal protection context only because of biological sex differences,[16] un-

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[14] See *United States* v. *Hinds County School Bd.*, 560 F.2d 619 (5th Cir. 1977) (invalidating system of separate single-sex public high schools); *Garrett* v. *Board of Educ.*, 775 F. Supp. 1004 (E.D. Mich. 1991) (granting preliminary injunction against males-only public elementary schools); *Kirstein* v. *Rector and Visitors of Univ. of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970) (requiring women's admission to University of Virginia); *Newberg* v. *Board of Pub. Educ.*, 478 A.2d 1352 (Pa. Super. Ct. 1984) (requiring girls' admission to Philadelphia's boys-only Central High School); but see *Vorchheimer* v. *School Dist.*, 532 F.2d 880, 881-882, 886 (3d Cir. 1976) (upholding Central High School's exclusionary admissions policy in litigation in federal court in which plaintiff "d[id] not allege a deprivation of an education equal to that which the school board makes available to boys"), aff'd by an equally divided Court, 430 U.S. 703 (1977).

[15] Indeed, this Court in *J.E.B.* v. *Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1428 (1994), invalidated sex-based preemptory challenges based on the sociological generalization that women "hold particular views simply because of their gender."

[16] In approving a statutory rape law that applied differently to men and women, this Court expressly disavowed relying,

challenged legal disabilities,[17] or for compensatory reasons.[18] Cross-petitioners ask this Court to rely, for the first time, on sociological and psychological stereotypes to restrict educational opportunity for women. That position is contrary to the established meaning of equal protection, and should be rejected.

As we argued in our opening brief in No. 94-1941, at 33-36, we believe that strict scrutiny is the correct constitutional standard for evaluating classifications that deny opportunities to individuals based on their sex. Because this Court has not previously applied

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as the lower court did here, on males' greater aggressiveness, and instead relied on the anatomical fact that "females can become pregnant as a result of sexual intercourse; males cannot." *Michael M.* v. *Superior Court of Sonoma County*, 450 U.S. 464, 473, 475, 476 (1981) (opinion of Rehnquist, J.) ("the statute does not rest on the assumption that males are generally the aggressors"); but cf. *International Union, United Automobile Workers* v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991) (holding that a sex-based policy of excluding women with childbearing capacity from lead-exposed job constitutes sex discrimination under Title VII).

[17] See *Rostker* v. *Goldberg*, 453 U.S. 57, 78 (1981) (upholding draft registration for men and not for women because unchallenged combat restrictions on all women made men and women "simply not similarly situated for purposes of a draft or registration for a draft").

[18] In *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), for example, the Court upheld a federal statute that afforded women Navy officers longer than men to gain promotion or face mandatory discharge, not because of any notion that women's personalities or sociological role make them achieve promotions more slowly, but because legal restrictions on all women in combat and sea duty—which were not challenged—made women and men "*not* similarly situated with respect to opportunities for professional services." *Id.* at 508.

strict scrutiny to sex-based classifications, however, we argued below, and show here, that cross-petitioners have not established that VMI's exclusionary policy satisfies intermediate scrutiny. Indeed, VMI's exclusion of women fails even meaningful rational-basis review. See *Kirstein* v. *Rector and Visitors of Univ. of Virginia*, 309 F. Supp. 184 (E.D. Va. 1970) (requiring admission of women to the University of Virginia).

Under intermediate scrutiny, "the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification." *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 (1982); see also *J.E.B.* v. *Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994). That burden is met "only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Hogan*, 458 U.S. at 724, quoting *Wengler* v. *Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980). Cross-petitioners fail to meet both parts of that burden.

Cross-petitioners' liability is evident from a straightforward application of *Hogan*. Just as this Court's "searching analysis" in *Hogan* revealed that the State lacked any actual compensatory objective for excluding men from a state educational program, 458 U.S. at 728-730 & n.16, the objectives proffered here for the exclusion of women are not actual, non-discriminatory reasons for the challenged policy. Like the single-sex admissions policy in *Hogan*, which rested on the "stereotyped view of nursing as an

exclusively woman's job," *id.* at 729, cross-petitioners' justifications reflect archaic stereotypes, and reinforce the view that men alone are fit for leadership and military careers. And just as the exclusion of men from the Mississippi University for Women (MUW) was not necessary to Mississippi's educational goals, *id.* at 731, VMI's men-only admissions policy is not necessary to serve any valid educational goals asserted here.

B. Cross-Petitioners Have Not Established That The Actual Reasons For Excluding Women From VMI Are Legitimate

A sex-based classification must be evaluated with reference to the *actual* reason the State has chosen to employ it. *Hogan*, 458 U.S. at 730 & n.16. Courts "need not in equal protection cases accept at face value assertions of [state] purposes, when an examination of the [challenged sex-based classification] and its history demonstrates that the asserted purpose could not have been a goal" of the classification. *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975). Yet, despite cross-petitioners' burden to justify VMI's policy in terms of the actual reasons it was adopted, they have not sought to identify and rely on those reasons.

VMI adopted its men-only admissions policy at its founding in 1839, and it has never changed that policy. See Dianne Avery, *Institutional Myths, Historical Narratives, and Social Science Evidence: Reading the "Record" in the Virginia Military Institute Case*, 5 S. Cal. Rev. L. & Women's Stud. (forthcoming Spring 1996), manuscript at 59-92 (regarding VMI early history) (lodged with the Court and served on opposing counsel). In 1839, prevailing

social norms presumed that men alone were capable of military or leadership training. See, *e.g.*, Pet. App. 41a-43a (Phillips, J., dissenting); Ann Firor Scott, *The Southern Lady: From Pedestal to Politics, 1830-1930*, at 68 (1970) (referring to severely restricted educational opportunities for women in the antebellum South). Even by the end of the nineteenth century, few women had access to any public higher education at all, and that education was focused on practical, "feminine" skills such as typing, drawing, cooking, needlework and housekeeping. See, *e.g.*, *Hogan*, 458 U.S. at 720 n.1 (regarding MUW, founded in 1884); *Williams* v. *McNair*, 316 F. Supp. 134, 136 n.3 (D.S.C. 1970) (regarding Winthrop College for girls, founded in 1891), aff'd mem., 401 U.S. 951 (1971). Rigorous public higher education was reserved for men, see, *e.g.*, *Kirstein*, *supra*, as was service in the military, see, *e.g.*, Martin Binkin & Shirley J. Bach, *Women and the Military* 4-6 (1977).

The original grounds for VMI's admissions policy, founded on officially unquestioned and harmfully constraining assumptions about men's and women's proper roles, are patently illegitimate today. Before this litigation was instituted, neither VMI nor the Commonwealth identified or acted upon any other basis for continuing to exclude women from VMI's student body.[19] To affirm the court of appeals' lia-

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[19] In the 1980s VMI conducted a Mission Study of its exclusionary admissions policy in the wake of this Court's decision in *Hogan*, *supra*. Pet. App. 208a. The Mission Study failed to supply *any* current, constitutional rationale for continuing to exclude women from VMI. The Committee's final report rejected admission of women, but "[t]he Report pro-

bility holding, this Court need go no further than to recognize the current constitutional invalidity of the reasons for which VMI initially adopted its discriminatory admissions policy.

C. Cross-Petitioners' Post-Hoc Rationalizations Also Do Not Justify Excluding Women From VMI

Cross-petitioners have not sought to defend VMI's admissions policy in terms of the actual reasons for which it was adopted. They have, instead, proffered a post-hoc objective. They now assert (Br. 28) that women must be excluded from VMI to serve the Commonwealth's interest in "offering a diversity of choices in higher education." [20] As cross-petitioners describe it, the diversity interest has two components: (1) enhancement of diversity by offering single-sex education within a system that is otherwise coeducational, and (2) enhancement of diversity by providing a distinctive style of military education. The court of appeals considered and correctly rejected that post-hoc "diversity" objective. This Court should do the same.

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vided very little indication of how this conclusion was reached." *Id.* at 212a; see generally L. 103-109, 110-117 (Mission Study Committee data); L. 195-199 (Final Report of Mission Study Committee). The report stated in a conclusory fashion that admission of women would "alter the mission" of VMI, and that, "[g]iven the experience of the U.S. Service Academies," demand among women from VMI would be inadequate. L. 196.

[20] Cross-petitioners do not assert here the second objective upon which they relied in the district court: an interest in producing citizen-soldiers. See pages 4, 5 n.5, 7 n.8, *supra*.

1. *Virginia has no state policy of advancing diversity in higher education through the provision of single-sex, military-style education*

Cross-petitioners have failed to demonstrate that either of the two components of system-wide diversity that they identify—enhancing diversity by providing single-sex education and a distinctive military-style educational method—are actually aspects of the Commonwealth of Virginia's interest in diversity in its higher education system. The court of appeals correctly held that Virginia lacks any state policy of advancing diversity in its system of higher education through the provision of single-sex education. Pet. App. 151a-154a; see also 94-1941 U.S. Br. 46-47.[21]

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[21] State policy requires each institution of higher education to deal with students without regard to sex. Pet. App. 153a. The Governor of Virginia thus stated in his Answer in this case that "no person should be denied admittance to a State supported school because of his or her gender." L. 7. The absence of a state policy in favor of single-sex education in higher education is borne out by the fact that all state statutes that formerly required single-sex admissions policies at certain institutions of higher education have been repealed, and none of Virginia's public colleges, other than VMI, is single-sex. More women than men in Virginia are enrolled in private single-sex institutions of higher education in Virginia, Pet. App. 189a, and the district court thus concluded that demand for single-sex public higher education is "greater among women than among men," *id.* at 190a. This suggests that, if the Commonwealth actually had a policy of offering single-sex education as an aspect of system-wide diversity in higher education, it would have offered such single-sex education to women. In light of those facts, cross-petitioners' contention (Br. 30) that the absence of single-sex public higher education for women in Virginia for almost a quarter of a century is the result of "an historical anomaly" in the application of an

Cross-petitioners appear to acknowledge (Br. 31) that Virginia does, in fact, lack any such policy at the state level.[22] Instead, they argue (Br. 31-32) that, because the Commonwealth delegates the authority for setting admissions policies to each individual state institution of higher education, VMI's own "decision to pursue the benefits of single-sex education and the VMI method" is a state purpose.

The Commonwealth of Virginia's delegation of admissions-policy authority to VMI, however, undermines, rather than supports, cross-petitioners' position. If single-sex, military-style education is offered by the Commonwealth for its educational benefits for some students, the state educational system must include both men's *and women's* military-style single-sex options (and presumably a coeducational option as well). No single institution of higher education has the capability to provide more than one of those options. Delegation to individual institutions thus cannot be a rational means of implementing a nondiscriminatory state policy of enhancing educational diversity by providing single-sex, military-style education. As the court of appeals correctly concluded, "if responsibility for implementing diversity has

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otherwise consistent policy favoring single-sex education is wholly implausible.

[22] Cross-petitioners' only suggestion to the contrary relies on the fact that, during the remedial stage of this case, state officials, including the Governor, made statements supporting the remedial plan to offer women a public single-sex leadership program at Mary Baldwin College. Cross-Pet. Br. 31 n.15; see L. 289-296. Those statements were made after the Commonwealth's liability had already been determined, and are thus irrelevant to a review of the court of appeals' liability determination.

somehow been delegated to an individual institution, no explanation is apparent as to how one institution with autonomy, but with no authority over any other state institution, can give effect to a state policy of diversity among institutions." Pet. App. 154a.[23]

2. *Virginia cannot enhance the diversity of choices in higher education for men alone*

The basic flaw in cross-petitioners' diversity rationale is that it completely fails to justify offering a diversity of choices to men but not to women. A State may not maintain a sex-based classification merely by showing that it confers a benefit on the favored sex; it must also justify benefitting that sex alone. The Court in *Hogan* rejected dissenting Justice Powell's suggestion that a public nursing school's

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[23] Whether a subdivision of a State can assert the State's objective in support of a challenged classification depends in each instance on the subdivision's authority and the nature of the objective. For example, in *Regents of Univ. of California* v. *Bakke*, 438 U.S. 265 (1978), Justice Powell concluded that an interest in diversity within the student body of any single institution was the kind of interest that a single institution was competent to assert. *Id.* at 311-312 (opinion of Powell, J.). And the opinions in *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989), and *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267 (1986), upon which cross-petitioners also rely (Br. 32), determined only that a city or school district may take steps to remedy its own discrimination, not, as cross-petitioners assert here, that those entities could assert interests beyond their own ability to effectuate. See *Croson*, 488 U.S. at 491 (opinion of O'Connor, J.) ("a state or local subdivision (if delegated the authority from the State) has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction"); *Wygant*, 476 U.S. at 277 (opinion of Powell, J.) (a public employer may adopt remedial affirmative action if it has "a strong basis in evidence" for doing so).

exclusion of men could be justified by the State's interest in providing to women the additional educational option of attending a single-sex nursing school. The Court observed that reliance on the value of a benefit provided to one class "begs the question" of "whether the State's decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal." 458 U.S. at 731 n.17; see also *Wengler*, 446 U.S. at 151. If the rule were otherwise, virtually all discriminatory classifications would be self-justifying. A State could, for example, designate its only engineering or medical school for men or its only school of education or art for women. In each of those cases, the favored class, like the men who attend VMI, would have a more diverse range of educational options from which to choose than they would in the absence of the single-sex school.

The Commonwealth's interest in fostering system-wide diversity of educational choices can therefore be a legitimate, nondiscriminatory rationale only insofar as the Commonwealth offers diversity for both men *and* women equally. As the court of appeals correctly held, "[i]f VMI's male-only admissions policy is in furtherance of a state policy of 'diversity,' the explanation of how the policy is furthered by affording a unique educational benefit only to males is lacking." Pet. App. 153a-154a. The addition of a men-only VMI to the educational options otherwise available in Virginia to both men and women cannot be substantially related to a *nondiscriminatory* interest in diversity.

Cross-petitioners contend (Br. 38) that a State that offers a single-sex, military-style education to en-

hance diversity need not offer such education to both sexes, and they point to *Hogan* for support. The interest asserted by the State in *Hogan*, however, was not diversity, but compensation for discrimination against women. 458 U.S. at 727. Offering a single-sex educational option exclusively to one sex alone can, perhaps, be justified on compensatory grounds. Unlike an interest in enhancing diversity, an interest in compensating one sex for discrimination is not undermined by the absence of an equal opportunity for the other sex. The goal of providing compensation for prior or present discrimination against one sex is necessarily served by providing benefits only to the disadvantaged group. Because the plaintiffs in *Hogan* argued (albeit unsuccessfully) that MUW excluded men in order to compensate women for discrimination, the Court did not view "the absence of any state-provided single-sex educational opportunity for the excluded gender [as] *itself* sufficient to render the challenged admissions policy unconstitutional." Cross-Pet. Br. 38. The absence of an opportunity for women is, however, dispositive in this case, where no compensatory rationale is present.[24]

To the extent that cross-petitioners assert that VMI itself has an interest in providing the pedagogical benefits of single-sex education to men only, VMI's

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[24] To the extent that cross-petitioners mean to suggest that VMI serves a compensatory rationale (Br. 46) ("VMI's males-only admissions policy serves to roughly equalize overall single-sex educational opportunities in Virginia for men and women" (internal quotation marks omitted)), they have their history backward. It is women, not men, who have experienced discrimination in higher education in Virginia. See, *e.g.*, *Kirstein*, 309 F. Supp. at 187.

admissions policy certainly serves that interest. Their argument (Br. 36-42) that single-sex education may constitutionally be provided to men alone, however, is simply a contention that single-sex education, *whether or not provided equally* to women and men, is constitutional *per se*. Under cross-petitioners' analysis, it would be a matter of constitutional indifference whether a State or school district offered some or all of its education through single-sex institutions, even if all or almost all the single-sex institutions were for men only. This Court considered and rejected that argument in *Hogan*.

Hogan contemplated that single-sex education might be permissible where its benefits for particular populations serve legitimate, important governmental objectives that cannot be served by sex-neutral alternatives. But the exclusion of one sex from an educational institution reserved for the other is clearly not a valid end in itself. A decision invalidating VMI's men-only admissions policy will not, contrary to cross-petitioners' suggestion (Br. 41-42), invalidate single-sex public education in all circumstances; it will, however, properly invalidate it where, as here, it is not justified by an important, nondiscriminatory state interest.[25] A decision upholding VMI's policy

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[25] As a practical matter, single-sex public education in the United States is extremely rare. There are only three public colleges in the United States that have sex-based admissions policies: VMI and The Citadel, both of which are men-only military schools, and the women-only Douglass College, in New Brunswick, New Jersey, on the Rutgers University campus. Pet. App. 189a-190a. At the high school level, there appear to be only two public single-sex schools: Girls High School in Philadelphia, and Western High School in Baltimore, both exclusively for girls. See Traci Johnson Mathena,

would, on the other hand, sweep away any meaningful constitutional scrutiny of programs that exclude persons based on sex.

Cross-petitioners contend (Br. 45) that the exclusion of women from VMI must be evaluated in the context "of the range of educational opportunities and public financial assistance afforded to women in Virginia's higher education system," including four private women's colleges in Virginia and one private men's college. They suggest (Br. 46) that VMI "helps fill a gap created by the private sector's failure to provide greater or more attractive single-sex opportunities for male college students." But, as the

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Best Western: As It Celebrates Its Vaunted Past, the City's All-Girls High School Prepares for a Future That Will Keep It at the Head of the Class, Balt. Sun, Oct. 30, 1994, at 8 (Magazine). We are unaware of any single-sex public elementary schools. With respect to single-sex classes in coeducational schools, Title IX (the federal statute that bars sex discrimination by educational institutions that receive federal funds) prohibits the provision of courses separately on the basis of sex, except in certain limited circumstances. See 20 U.S.C. 1681; 34 C.F.R. 106.34(c) (certain physical education classes), (e) (classes dealing exclusively with human sexuality); 34 C.F.R. 106.3 (permitting sex-based remedial action).

In citing examples of circumstances in which it believes public single-sex education may be beneficial, VMI refers (Br. 41) to a Virginia statute as "authorizing local school boards to offer single-sex classes in the Commonwealth's public schools." The statute, however, expressly notes that its authorization is limited to circumstances in which offering such classes would be "[c]onsistent with constitutional principles." 1995 Va. Acts ch. 582 (to be codified at Va. Code Ann. § 22.1-212.1:1 (Michie Supp. 1995)). To the extent that Virginia's public schools receive federal funds, Title IX's limitations would also apply.

court of appeals correctly noted, "[n]o other school in Virginia or in the United States, *public or private*," offers to women what they are denied at VMI. Pet. App. 151a (emphasis added).[26] In any event, the existence of private women's colleges in Virginia has no bearing on the Commonwealth's constitutional obligation to treat men and women equally within its own system of public higher education. The Constitution requires that *the State* treat all persons equally.

3. *VMI need not exclude women in order to offer "a distinctive program of military-style education"*

a. Cross-petitioners assert (Br. 27) that "VMI's methodology has proven to be particularly beneficial to the adolescent male students it attracts." But it is undisputed that some women can do everything that is required of cadets at VMI, Pet. App. 170a, and that "some women will thrive in the adversative environment," *id.* at 172a. There is therefore no valid justification for providing VMI's military-style education to men and not to women.

If VMI admitted women, the diversity of educational options in Virginia's system of public higher education would remain enhanced by the VMI program, but that diversity interest would be served in a legitimate, nondiscriminatory manner. The lower

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[26] A State may of course design its public education system with an eye to the offerings already available in the private sector, and thus, for example, set up a medical school but not a law school to complement a private system that includes a law school but not a medical school. But the permissibility of viewing public and private resources as a whole for such sex-neutral purposes, see, *e.g.*, Pet. App. 191a, cannot detract from the State's obligation to treat men and women equally in its own institutions.

courts recognized that VMI is strikingly different from every other college in Virginia for a multitude of reasons beyond its exclusion of women.[27] Cross-petitioners' claim (Br. 34) that admission of women would eliminate the "very aspects of [VMI's] program that distinguish it from * * * other institutions of higher education in Virginia" is thus simply incorrect.

Although admission of women to VMI would require some changes at that institution, those changes also do not justify excluding women. The only changes that the court of appeals anticipated would

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[27] VMI's suggestion (Br. 9-10, 36) that Virginia Polytechnic Institute and State University (VPI) is a coeducational equivalent to VMI was correctly rejected by the district court and the court of appeals. Indeed, cross-petitioners themselves previously repudiated that position. See, *e.g.*, R. 152 (VMI Defendants' Proposed Findings of Fact and Conclusions of Law (liability phase) (Apr. 26, 1991)), at 97 (¶ 536). The court of appeals in its liability opinion concluded that VPI is not similar to VMI. Pet. App. 151a n.8. The district court, too, concluded that "VMI and the military barracks at [VPI] are dramatically different institutions that offer dramatically different experiences," *id.* at 192a, and that "[t]he differences between VPI and VMI's educational experiences outweigh the similarities, independent of gender," *id.* at 218a. VPI maintains only a 394-person residential corps of cadets within a larger, non-military-oriented student body of 18,000. *Id.* at 214. Thus, a coeducational VMI "would remain the only small college campus in Virginia offering a military program." *Id.* at 173a-174a; see also *id.* at 218a. The district court also contrasted the operation of the respective corps: "VMI emphasizes uniformity, hierarchy, and the adversative method. VPI recognizes individual differences and is more informal." *Ibid.* And, most importantly, VPI's corps of cadets lacks the traditions, prestige and alumni ties that VMI enjoys. *Id.* at 192a.

result from admitting women to VMI are changes in "physical training, the absence of privacy, and the adversative approach." Pet. App. 147a-148a. Cross-petitioners have failed to identify any state interest whatsoever in preserving those particular attributes of VMI's method in exactly their current form—and they certainly have not identified any such interest sufficiently important to justify excluding women from VMI.

Admission of women would not require VMI to change materially the distinctive, military-style educational benefits it currently affords. See 94-1941 U.S. Br. 28-33.[28] As we argued in our opening brief, accommodations necessary to preserve privacy or account for physical differences would be minimal, and would not adversely affect the ability of VMI to continue to fulfill its mission of producing "citizen-soldiers" through its military-style program. The court of appeals' concern that the "decency that still permeates the relationship between the sexes" (Pet. App. 23a) would suffer if the "adversative" method

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[28] VMI asserts (Br. 34, 36) that it is "[t]he simple truth * * * that 'VMI's mission can be accomplished only in a single-gender environment,'" and that "that factual issue was resolved against the Government by both courts below." The United States does not contest that some limited changes, such as separate toilets, would be needed. The dispute focuses, rather, on the legal conclusions to be drawn regarding such changes—specifically, whether the admission of women would change VMI in a manner material to any actual state interest of the Commonwealth, and whether the refusal to make those changes is constitutional in light of the fact that the result of that refusal is the exclusion of women from a unique educational program. These are purely legal issues subject to *de novo* review.

were conducted in a coeducational environment is constitutionally invalid; women who are qualified to attend VMI and who want to go there cannot be excluded in the name of advancing archaic notions of appropriate interaction between women and men.[29] Moreover, the benefits to men of attending VMI would probably be enhanced, rather than diminished, if women were admitted. Leadership and military careers in today's society require men and women to interact in a mature, respectful and professional manner with members of the other sex. See, *e.g.*, Pet. App. 241a-242a (district court finding that, upon the admission of women, "[i]f anything, the VMI ROTC experience would become a better training program from the perspective of the armed forces, because it would provide training in dealing with a mixed-gender army").

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[29] Cross-petitioners' assertion (Br. 35) that, if women were present, "the strict egalitarianism that pervades all aspects of the program[] would undergo radical change or disappear altogether" is absurd. Egalitarianism would be advanced, not hindered, by admitting qualified women to VMI, just as egalitarianism was advanced when African American students were first admitted to VMI in 1968. No one suggests that "tensions" that are "incompatible with VMI's educational method" (*ibid.*) arise because VMI has special programs devoted to "Retention of Black Cadets," Pet. App. 229a-230a, providing them with academic assistance, *VMI I* C.A. App. 1435, and fostering "[s]ocial-cultural support and black student morale within a dominantly white institution," *id.* at 1438. See also 94-1941 U.S. Br. 29 (recounting existing differences in treatment of male cadets). The notion that egalitarianism *suffers* when women and men are together, because minor accommodations need to be made, is inconsistent with the most fundamental meaning of the Equal Protection Clause.

b. Cross-petitioners contend (Br. 43-45) that VMI may continue to exclude women in the absence of any alternative because of an asserted lack of demand among women for a VMI-type education. There is no factual basis for that argument, and it is also contrary to established law because based on stereotyped views of women's preferences and abilities.[30] The district court thus correctly viewed the level of demand as irrelevant as a matter of law. Pet. App. 174a. It found, in addition, that "VMI would be able to achieve at least 10% female enrollment" and that "[t]his would be a sufficient 'critical mass' to provide the female cadets with a positive educational experience." *Id.* at 232a.[31]

Cross-petitioners do not disagree with that factual determination. Instead, they allege a lack of demand for a separate, women-only "VMI." Even if that factual allegation were supported (which it is not), a low level of demand for a separate opportunity—even one, like a school, that requires investment of substantial resources—cannot justify otherwise unconstitutional discrimination. Thus, at a time when separate-

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[30] VMI's failure to raise this argument in the lower courts also waived it.

[31] See also Pet. App. 231a (crediting cross-petitioners' expert witness testimony that "successful recruitment of women would likely yield VMI a cadet corps of approximately 10% women, or 130 women"); *id.* at 174a ("some women, at least, would want to attend [VMI] if they had the opportunity"). VMI engages in "extensive recruiting activities" to attract men and makes no effort to recruit women, *id.* at 228a, yet "[d]uring the two years preceding the filing of this action, * * * [VMI] receive[d] over 300 inquiries from women," *id.* at 141a; see also *id.* at 229a (district court finding); see, *e.g.*, L. 156.

but-equal racial segregation was constitutionally permissible, the Court held that a black person could not be denied admission to the State's only (all-white) law school on the ground that not enough blacks were interested in law to justify the State's establishment of a black law school. *Missouri. ex rel. Gaines* v. *Canada*, 305 U.S. 337 (1938). The equal protection right of the black law school applicant was "a personal one," and he was entitled to be furnished an educational program equal to that provided to whites "whether or not other negroes also sought the same opportunity." *Id.* at 351. And as early as 1914 the Court held that the failure to offer black travelers luxury railroad accommodations could not be justified on the ground that the carrier wished to segregate the races and too few black travelers could afford luxury accommodations to justify their provision for blacks. *McCabe* v. *Atchison, T. & S.F. Ry.*, 235 U.S. 151. Cross-petitioners have failed to cite a single case to support their demand-based defense, and we know of none.[32]

As a factual matter, cross-petitioners failed to show that there is an actual lack of demand for a separate, women's VMI. The only evidence cited regarding allegedly low levels of presumed demand for a women's VMI was offered in the *remedial* proceedings, in an effort to justify VWIL's substantial differences from VMI. That evidence is avowedly completely speculative and not based on empirically re-

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[32] But see *Faulkner* v. *Jones*, 51 F.3d at 445 (emphasis omitted) (speculating, in absence of evidence of lack of demand, whether established rule that "demand is not relevant to an equal protection analysis" might differ when the State confers not a "civil right" but an "economic benefit").

liable surveys or other reliable methodology,[33] and was, in all events, introduced too late to be relevant to the already completed liability proceeding.

It would, moreover, be impossible suddenly to create a new institution for women only that would be equal to VMI. See 94-1941 U.S. Br. 20-25. Given the inevitable deficiencies in facilities, faculty, prestige, traditions and alumni connections of a new, separate "women's VMI," it thus would not be at all surprising if some women who are interested in attending VMI itself would not want to attend such a new, separate institution. The impossibility of quickly duplicating for women an established and successful men-only college is a reason that qualified women must be admitted to the existing institution, not a justification for continuing to exclude them. See *Sweatt* v. *Painter*, 339 U.S. 629 (1950) (requiring admission of black plaintiff to whites-only law school due to absence of constitutionally adequate separate alternative for blacks); *Faulkner* v. *Jones*, 51 F.3d 440, 450 (requiring admission of woman plaintiff to men-only military college if the State failed to provide a constitutionally adequate single-sex alternative for women), motion to stay mandate denied, 66 F.3d 661 (4th Cir.), application for stay of enforcement denied, No. A-127 (Aug. 11, 1995).

Demand is also a product of the historical availability of opportunities. The fact that Virginia has

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[33] One of the experts whose testimony cross-petitioners cite merely extrapolated from his own conclusions about women's personalities to conclude that there would be little demand for a women's VMI. Pet. App. 73a-74a. A second expert arrived at the same conclusion by referring to demand among women for West Point and VPI, *id.* at 75a n.12, both of which in fact successfully appeal to ample numbers of women.

never offered—and still does not offer—a VMI education to women thus undoubtedly plays a large role in the apparent level of women's interest in such an institution.[34] Sex-based official policies that restrict opportunity based on stereotypes are harmful precisely because they reinforce restrictive roles for men and women. When the roles deemed appropriate for men and women are thus restricted, individuals' sense of possibility is artificially curtailed. Arguments based on "demand" are accordingly especially suspect in this setting.[35]

II. THE LEGALITY OF PRIVATE SINGLE-SEX EDUCATION WOULD BE UNAFFECTED BY A HOLDING THAT VMI'S ADMISSIONS POLICY IS UNCONSTITUTIONAL

Contrary to cross-petitioners' suggestion (Br. 41), the unconstitutionality of VMI's men-only admissions policy, like the unconstitutionality of the MUW women-only admissions policy invalidated in *Hogan*, does not affect the continued legality of private single-

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[34] Cf. *Dothard* v. *Rawlinson*, 433 U.S. 321, 330 (1977) (under Title VII, the actual applicant pool for a particular position may be artificially depressed "since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory"); *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 365-367 (1977).

[35] It is noteworthy, for example, in light of the 1972 enactment of Title IX, that, from 1971 to 1978, girls' participation in organized high school sports rose by over 600% (notwithstanding a 5% decrease in overall enrollment of girls in high school during that period). See 44 Fed. Reg. 71,419 (1979). Women's participation in college intramural and intercollegiate sports rose by over 100% during the same period. *Ibid.*

sex education. Private entities are not state actors under the United States Constitution; thus a ruling that VMI cannot constitutionally continue to exclude women would not, for example, require private, men's institutions such as Hampton-Sydney and Morehouse Colleges, or private, women's institutions such as Randolph-Macon and Spelman Colleges, to admit members of the other sex.[36]

Because the Fourteenth Amendment "erects no shield against merely private conduct, however discriminatory or wrongful," *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1948), such a ruling also will not prevent governments from providing financial assistance to private educational institutions, including single-sex institutions, pursuant to nondiscriminatory governmental assistance programs.[37] The provision of even substantial public assistance has been held not to convert an otherwise private entity into a governmental actor. See 94-1941 U.S. Br. 45 n.31. In *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 843 (1982), for example, the Court held that, even where public

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[36] With certain specified exceptions, private educational institutions that receive federal financial assistance may maintain single-sex admissions policies without violating the nondiscrimination requirements of Title IX, 20 U.S.C. 1681(a). But see 20 U.S.C. 1681(a)(1) (excepting private "institutions of vocational education, professional education, and graduate higher education"). Under federal law, private schools may not, however, refuse admission to qualified individuals based on race—a prohibition that applies without regard to receipt of federal funds. See 42 U.S.C. 1981; *Runyon* v. *McCrary*, 427 U.S. 160 (1976). Section 1981 is inapplicable to sex discrimination.

[37] That would be true whether intermediate or strict scrutiny applies.

funds accounted for virtually all of a private school's operating budget, the school was not subject to constitutional constraints. A State is held constitutionally liable for a private institution's policies "only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains"; such responsibility exists only where the State has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982). "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." *Id.* at 1004-1005.

Cross-petitioners err in contending (Br. 41-42) that this Court's decision in *Norwood* v. *Harrison*, 413 U.S. 455 (1973), is to the contrary. *Norwood* held that a State that was under a federal desegregation order, and that therefore had an affirmative constitutional duty to dismantle its segregated system of education, could not provide aid to all-white private schools founded in order to avoid public school desegregation. *Id.* at 467-468. Providing public assistance to private institutions that admit only members of certain groups has not been held to violate equal protection when that aid is part of a nondiscriminatory government program serving legitimate governmental objectives. See, *e.g.*, *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 176 (1972) (State's grant of valuable liquor license to private club does not render State liable for club's policy of racial exclusion).

CONCLUSION

The judgment of the court of appeals on liability should be affirmed.

Respectfully submitted.

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IN THE

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OCTOBER TERM, 1995

UNITED STATES OF AMERICA
Petitioner,

v.

COMMONWEALTH OF VIRGINIA, *et al.*,
Respondents.

COMMONWEALTH OF VIRGINIA, *et al.*,
Cross-Petitioners,

v.

UNITED STATES OF AMERICA
Cross-Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. VMI'S ADMISSIONS POLICY SERVES IMPORTANT GOVERNMENTAL OBJECTIVES 2

A. Providing The Proven Benefits Of Single-Sex Education And The VMI Method Are Important Governmental Objectives 2

B. Achieving The Benefits Of Single-Sex Education And The VMI Method Are The Actual Reasons For VMI's Admissions Policy 5

II. VMI'S SINGLE-SEX ADMISSIONS POLICY IS SUBSTANTIALLY RELATED TO ACHIEVING IMPORTANT GOVERNMENTAL OBJECTIVES 10

III. VMI'S SINGLE-SEX ADMISSIONS POLICY DOES NOT DENY EDUCATIONAL OPPORTUNITY TO WOMEN STUDENTS 14

IV. THE GOVERNMENT'S VIEW OF THE LAW WOULD EFFECTIVELY PRECLUDE ALL PUBLIC SUPPORT FOR SINGLE-SEX EDUCATION 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases:

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800 (1988) 17

Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981) 2,6,7

Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) 4,9

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) 20

Norwood v. Harrison, 413 U.S. 455 (1973) 19,20

Rostker v. Goldberg, 453 U.S. 57 (1981) 6,7

Schweiker v. Hogan, 457 U.S. 569 (1982) 17

United States v. New York Telephone Co., 434 U.S. 159 (1977) 17

Statute:

20 U.S.C. § 1681(a) & (a)(5) 8

Other Authorities:

MANUAL OF THE SENATE, GENERAL ASSEMBLY OF VIRGINIA (1994-95) 16

U.S. NEWS & WORLD REP. (Sept. 18, 1995) 15

VIRGINIA HOUSE OF DELEGATES MANUAL (1994-95) 16

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Petitioner,

v.

COMMONWEALTH OF VIRGINIA, *et al.*,

Respondents.

No. 94-2107

COMMONWEALTH OF VIRGINIA, *et al.*,

Cross-Petitioners,

v.

UNITED STATES OF AMERICA

Cross-Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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REPLY BRIEF FOR THE CROSS-PETITIONERS

In its brief as cross-respondent in No. 94-2107 ("Br."), the Government makes clear that it seeks the elimination of essentially all public single-sex education in the United States. Under the Government's view of the law, neither the proven and essentially unquestioned pedagogical advantages of single-sex education for some students, nor the informed judgments of educators about how best to use scarce educational resources to meet the needs and interests of students of both sexes, can permit any deviation from a single-minded insistence on coeducation. But the Equal Protection Clause cannot and should not be construed to constitutionalize the Government's misguided conception of equality at the expense of the proven educational interests

and needs of the Nation's young men and women.

In its quest to impose coeducation as the only permissible pedagogical option, the Government disregards the informed opinions of expert educators and the careful fact-finding of the courts below. The intermediate scrutiny test calls for detailed factual analysis of all relevant circumstances relating to a challenged classification. Nevertheless, the Government repeatedly ignores or dismisses as "stereotypes" the reasoned findings of both courts below, even though those findings are based on overwhelming expert evidence that demonstrates the positive educational benefits of single-sex education and the impossibility of duplicating the distinctive qualities of VMI's method in a coeducational setting. In effect, the Government argues that lawyers, not experienced educators applying the conclusions of contemporary research, should determine "what is 'current' and what is 'outmoded' in the perception of" male and female college students. *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 471 n.6 (1981) (plurality opinion). That approach must be rejected.

I. VMI'S ADMISSIONS POLICY SERVES IMPORTANT GOVERNMENTAL OBJECTIVES

A. Providing The Proven Benefits Of Single-Sex Education And The VMI Method Are Important Governmental Objectives

The Government makes no effort to, and could not in any event, refute the established fact that single-sex education provides substantial pedagogical benefits to some college students that cannot be supplied by a coeducational program. *See* Va. Br. 24-28; Va. Resp. Br. 19-21. The Government instead contends that the Equal Protection Clause prohibits Virginia and VMI from offering those benefits because, in its view, VMI's single-sex admissions policy "reinforce[s] restrictive roles for men and women" and is based on the stereotype that "rigorous, military-style train-

ing is not appropriate for women." Br. 14, 35. There is no merit in those contentions.

VMI's single-sex admissions policy is not founded on impermissible stereotypes about the "proper" roles of men and women. To the contrary, Virginia has acted pursuant to its conviction that women students are well suited for all courses of study and roles in life. The vast majority of Virginia's institutions of higher education, including the "rigorous, military-style training" program at Virginia Polytechnic Institute and State University (VPI), are open to women, and there is no subject or course of study offered at VMI that is not available to women at other prestigious public institutions in Virginia.

Rather than embodying stereotypes about gender roles, VMI's single-sex admissions policy instead reflects the obvious truth that the benefits of single-sex education can only be offered by an institution that limits admission to one sex, and the additional fact (found by both courts below) that VMI's educational methodology is not practicable in a coeducational setting. *See* Va. Br. 33-36; Va. Resp. Br. 43-47. As both courts below found, moreover, single-sex education in fact helps to combat gender stereotypes by encouraging students to pursue careers once associated primarily with the opposite sex. Pet. App. 149a-50a, 226a-27a.[1]

The Government also argues (Br. 15-16, 23-26) that there

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[1]The Government inaccurately characterizes this factual *finding* as "cross-petitioners' *suggestion*," and purports to find it "bewildering." Br. 14-15 (emphasis added). The Government's bewilderment cannot change the reality that this unambiguous factual finding was affirmed on appeal and is supported by overwhelming expert evidence. *See* I DX 73J (II DX 216J); Riesman Dep. (I DX 60) at 58, 106-07 (I JA 194, 242-43); *see also* Br. *Amicus Curiae* of Mary Baldwin College at 17-20.

can be no valid governmental interest in providing the benefits of single-sex education absent identical programs for both genders.[2] That argument rests on a misreading of this Court's decision in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). The women-only admissions policy at issue in *Hogan* was not and could not be defended on the ground that single-sex education provides unique benefits that are lost in a coeducational environment; the "uncontroverted record" in that case was "flatly inconsistent with the claim that excluding men . . . [wa]s necessary to reach any of [the nursing school's] educational goals." *Id.* at 730-31.

It is an established fact in this case, by contrast, that VMI's single-sex admissions policy *is* necessary to achieve the goals of offering students the proven benefits of single-sex education and the VMI method. *Hogan* simply cannot be read to reject the constitutional validity of single-sex education under these circumstances.[3] Indeed, as the Government concedes (Br. 26), *Hogan* suggests that single-sex education *is* permissible "where its benefits for particular populations serve legitimate, important governmental objectives that cannot be served by sex-neutral alternatives."

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[2]Of course, Virginia does provide the benefits of single-sex education to both women and men through the parallel and comparable VWIL and VMI programs, as the courts below found.

[3]Thus, the Government's reliance on footnote 17 in *Hogan* is misplaced. That footnote reflects only the commonsense notion that a single-sex program cannot automatically be justified merely by a showing that it provides generic benefits -- unrelated to its single-sex status -- for anyone who participates in it. The proponents of such a program must show instead that there is a substantial relationship between the program's exclusion of one gender and its ability to provide the particular educational benefits it offers. That showing was not attempted in *Hogan*, but it has been made here.

VMI's single-sex admissions policy has been found to provide benefits for its students that cannot be replicated in a coeducational environment, and that finding demonstrates its constitutional validity.[4]

Contrary to the Government's suggestions (Br. 24, 26), the validity of VMI's single-sex admissions policy does not mean that all single-sex programs are "constitutional *per se*" or that a State could "designate its only engineering or medical school for men" or limit most of its educational offerings to students of one sex. Each public single-sex program must be examined against the backdrop of the State's overall educational offerings to determine whether the exclusion of the opposite sex actually increases educational diversity and enhances educational benefits without unduly restricting opportunity. The extreme hypotheticals offered by the Government would be impossible to justify under that standard. The facts of this case demonstrate, by contrast, that VMI's single-sex policy provides substantial pedagogical benefits and enhances educational diversity without depriving women of any educational opportunity they could obtain if VMI were coeducational.

B. Achieving The Benefits Of Single-Sex Education And The VMI Method Are The Actual Reasons For VMI's Admissions Policy

The Government contends (Br. 18-23) that the justifications advanced for VMI's admissions policy are not the

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[4]The Government confuses the means with the end in arguing (Br. 26) that the exclusion of one gender from a particular institution "is clearly not a valid end in itself." VMI's single-sex admissions policy is not an "end in itself" but a *sine qua non* for the proven pedagogical advantages for some students that flow from a single-sex environment and the VMI method. It is those proven advantages, not the exclusion of one sex, that cross-petitioners seek.

actual reasons for that policy. First, the Government asserts (*id.* at 19) that VMI's policy was originally founded upon invalid "assumptions about men's and women's proper roles." That bald assertion is unsupported by any citation to the record, nor could it be. And more to the point, VMI reexamined its admissions policy years before this litigation commenced and decided after careful analysis to maintain that policy in order to continue providing the benefits of single-sex education and the VMI method. *See* Va. Br. 13-14, 30-31; *see also Rostker v. Goldberg*, 453 U.S. 57, 74-75 (1981) (rejecting contention that gender-based classifications must be judged by reference to the original reasons for their adoption); *Michael M.*, 450 U.S. at 470-72 & nn.6-7 (same).

The Government thus errs in asserting (Br. 19) that Virginia did not identify any legitimate basis for maintaining VMI's single-sex admissions policy before this suit was instituted. In recommending continuation of VMI's admissions policy in 1986, the Mission Study Committee specifically relied on its concern that VMI's system would not achieve the same results in a coeducational environment. I DX 40 at 2-3 (I JA 1721-22; L. 196-97). The VMI Board of Visitors, which is "convinced of the value of single sex education," looked to its own expertise and experience as well as the Mission Committee's report and concluded that VMI's single-sex status was "absolutely essential" to the successful implementation of its educational methodology. I Tr. 947-48, 951-52, 971 (I JA 1193-94, 1197-98, 1217).

Thus, the district court was amply justified in finding that VMI's admissions policy "has been continued only after reasoned and careful analysis by the Board of Visitors" and is based on the Board's conclusion "that providing a distinctive, single-sex educational opportunity" is an "important" goal. Pet. App. 170a, 214a; *see id.* at 173a. In short, VMI's admissions policy has been retained only after careful consideration of the coeducational alternative. That

reasoned and legitimate policy choice cannot be dismissed as an unthinking stereotype. *See Rostker v. Goldberg*, 453 U.S. at 74; *Michael M.*, 450 U.S. at 471 n.6 (plurality opinion).[5]

The Government is also wrong in characterizing as "post hoc" Virginia's interest in providing diverse educational offerings including single-sex education. Br. 20. There is no dispute that Virginia has long had an official policy of emphasizing diversity of educational offerings through delegation of substantial decisionmaking authority to each individual public institution of higher education. Pet. App. 81a, 152a, 187a-88a; Va. Br. 28-30. VMI's 1986 decision to continue to offer the benefits of single-sex education is plainly consistent with and in direct furtherance of that official state policy. As explained in the 1990 Report of the Commission on the University of the 21st Century to the Governor and General Assembly of Virginia, the "diversity and autonomy" of Virginia's "formal system of higher education" is demonstrated by its "great array of institutions," specifically including the option of "*single-sex*" education. Stips. 37-38 (I JA 82-83; L. 64-65) (em-

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[5]The Government asserts (Br. 4) that the Commonwealth previously "denied that VMI's discriminatory policy fostered *any* state objectives." That assertion is patently false. In the district court, the Commonwealth took the position that "VMI's academic mission contributes to the diversity and balance of Virginia higher education, thereby serving the important governmental interest of the Commonwealth in offering its citizens a wide diversity of educational choices." R.5 at 5 ¶ 17 (I JA 35). Thereafter, the Commonwealth chose not to participate separately in the liability proceedings because VMI and the Governor were already represented by different counsel and thus "the separate participation of the Commonwealth would be superfluous," R.68 at 6 (I JA 128; L.19). At *no* time did the Commonwealth change its position that VMI's admissions policy serves important state interests (*see* Pet. App. 81a).

phasis added).[6]

The Government asserts (Br. 21 & n.21) that Virginia has no policy favoring single-sex education because no Virginia statute mandates single-sex admissions policies in higher education.[7] But there is no constitutional requirement that governmental goals must be codified before they can be considered legitimate. VMI's Board exercises the full authority of the Commonwealth in determining VMI's admissions policies, and thus its decision to pursue the benefits of single-sex education and the VMI method necessarily and by definition constitutes state policy.[8] To be sure, the

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[6]The court of appeals noted the 1990 Report's admonition that institutions should "'deal with faculty, staff, and students without regard to sex.'" Pet. App. 153a (emphasis eliminated). The Government misinterprets this statement to mean that Virginia policy opposes single-sex education. Br. 21 n.21. That reading, however, is contrary to the Report's recognition that single-sex institutions further the Commonwealth's interest in diversity. The quoted statement does not address admissions policies at all. Instead, the Report merely reflects the requirements of Title IX, which prohibits gender discrimination in higher education but expressly approves public single-sex schools like VMI. 20 U.S.C. § 1681(a) and (a)(5).

[7]The Government also relies (Br. 21 n.21) on then-Governor Wilder's statement of his "personal philosophy" regarding public single-sex education. R.43 at 4 (I JA 41; L. 7). However, then-Governor Wilder's personal philosophy was *contrary* to the Commonwealth's position, as evidenced by the fact that he was represented by special counsel in this case because of "the conflicts between his interest and that of the Commonwealth." R.68 at 2 (I JA 124; L. 15). And in any event, former Governor Wilder and all current high-ranking Virginia officials support single-sex education at VWIL and VMI. Pet. App. 81a-83a; Va. Br. 31 n.15.

[8]Indeed, the Government concedes this point elsewhere in its brief, asserting (Br. 14) that VMI's admissions policy reflects

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Virginia General Assembly has the ultimate authority to change VMI's admissions policy if it deems that policy contrary to the Commonwealth's educational objectives, but it has consistently declined to mandate coeducation at VMI.

Contrary to the Government's suggestion (Br. 22), therefore, Virginia *does* have a policy in favor of single-sex education "at the state level."[9] The fact that Virginia also pursues other educational goals, and thus has devoted most of its educational expenditures to coeducational programs, is fully consistent with that goal. Virginia has continued to provide substantial financial support for women attending private single-sex colleges. Nothing in this Court's precedents suggests that a proffered governmental objective must be ignored unless it has been implemented to the point of excluding the accomplishment of other goals. Virginia provides diverse and beneficial educational programs in accordance with student needs and interests, and VMI's decision to retain its single-sex program is one important element of that overarching goal. Virginia could advance that objective still further by offering a comparable public single-sex opportunity to women, and has done precisely that with the establishment of VWIL, but the fact that Virginia for a time focused its support for women's single-sex education exclusively through its financial assistance to private colleges does not demonstrate that Virginia lacks an interest

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"the Commonwealth's official view."

[9]Of course, the Constitution does not specify the "level" of government at which an important objective must be asserted. As it happens, VMI's admissions policy is reflective of state policy, but *Hogan* requires only an "'important *governmental* objective[],'" not that the objective be asserted by the State as a whole. 458 U.S. at 724 (emphasis added).

in providing the benefits of single-sex education where educational need, student demand, and institutional interest make that option feasible and important.

II. VMI'S SINGLE-SEX ADMISSIONS POLICY IS SUBSTANTIALLY RELATED TO ACHIEVING IMPORTANT GOVERNMENTAL OBJECTIVES

The Government asserts (Br. 28-31) that VMI's single-sex environment is not substantially related to achieving the benefits of VMI's particular educational method. That assertion is contrary to the factual findings of both courts below. Indeed, the Government does not dispute that VMI's single-sex admissions policy is necessary to the goal of providing the advantages of single-sex education. That concession in itself demonstrates that VMI satisfies the second prong of the *Hogan* test.

The Government argues, however, that VMI cannot justify excluding women who could succeed in its program. That argument is flawed, because VMI could no longer offer the benefits of single-sex education or its particular methodology if it were to become coeducational. *See* Va. Br. 34-36. The Government disputes the latter finding, contending (Br. 28-29) that VMI is "strikingly different" from all other schools in Virginia and that admission of women would thus not interfere with Virginia's goal of offering diverse educational opportunities. That argument simply ignores the loss of diversity and pedagogical advantages that would result from the elimination of public single-sex education in Virginia. Moreover, the courts below found that the very attributes that differentiate VMI's methodology from the residential military educational programs at VPI and other schools would disappear with coeducation, further reducing the diversity of Virginia's educational offerings.[10] In short, "if VMI were to admit women, it

[10]Contrary to the Government's mischaracterization (Br. 29

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would become more similar to the military barracks at VPI, so its uniqueness would be lost." Pet. App. 173a.[11]

Conceding that some changes would be necessary if VMI were to become coeducational, the Government next challenges the extent of those changes, asserting that only "minimal" changes would be required that would not "adversely affect" VMI's "military-style program."[12] But the

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n.27), cross-petitioners did not argue in their opening brief that VMI and VPI now offer the same educational experiences. What cross-petitioners argue (Va. Br. 36), and the courts below found (Pet. App. 6a-7a, 172a n.8, 173a), is that VMI's distinctive methodology could not accommodate a coeducational student body, and thus that coeducation would force VMI to modify its methodology to conform to the approach already followed at VPI and West Point.

[11]To be sure, VMI would remain smaller than VPI (Pet. App. 173a-74a), but the Government does not pretend that the constitutional injury allegedly suffered by women is denial of the opportunity to attend a small college.

[12]The Government also asserts (Br. 30 n.28) that the dispute between the parties "focuses . . . on the legal conclusions to be drawn regarding such changes" rather than on the factual question of the extent of the changes that would be required. That assertion is incorrect. The courts below found *as a fact* that coeducation would necessarily change the distinctive aspects of VMI's educational system, including the physical program, the total absence of privacy, and the extreme adversative method, to such an extent that those "'unique characteristics of VMI's program would be destroyed by coeducation.'" Pet. App. 6a-7a, 148a. The Government cannot plausibly maintain that it is raising only a legal challenge to the rulings below, because it refuses to accept these *factual* findings about the extent of the changes that would occur.

Government cannot simply substitute its opinions for the amply supported factual findings below. The record is clear that the strict egalitarianism that lies at the core of the adversative method would necessarily be lost with coeducation. Pet. App. 146a-47a, 237a-38a.

The Government mislabels this factual *finding* as nothing more than an "assertion" of cross-petitioners, and characterizes it as "absurd." Br. 31 n.29. There is nothing "absurd," however, about the fact that VMI would be forced to adopt different physical fitness standards and grading criteria for men and women, just as West Point has done. Pet. App. 146a-47a, 235a-36a; I Tr. 489, 520-22, 625-26 (I JA 736, 767-69, 872-73). As West Point's experience demonstrates, there are inevitable consequences of these necessary gender-based differences in treatment. Pet. App. 146a-47a.[13] Nor was it "absurd" for the courts below to find, based on expert testimony and the experience of the service academies, that the creation of privacy rights for gender classes and the inevitability of cross-gender relationships would further eviscerate the egalitarianism that is so crucial to the effectiveness of the VMI method. Pet. App. 147a, 233a, 237a-39a; *see also* I Tr. 514 (I JA 761).[14]

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[13]A 1990 West Point study, for example, found continuing resentment and perceptions of inequality, including a belief on the part of most women cadets that they are treated differently and are not fully accepted. I PX 123 (II DX 231); I Tr. 528-29, 533-34 (I JA 775-76, 780-81).

[14]The Government errs in analogizing VMI's successful integration of black students to the impact of coeducation. None of the aspects of VMI's system characterized as unique by the Government or the courts below had to be changed to accommodate black male students; the physical standards, the strict egalitarianism, the total absence of privacy, and the extreme adversative system were entirely unaffected. The service academies and the courts below found the reverse to be true of

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The Government makes no effort to refute the finding below that VMI's adversative method, including the intentional intimidation and pressures inflicted on new students by upperclassmen, could not survive in a coeducational environment. Pet. App. 6a-7a, 146a-47a, 172a n.8, 237a-39a. Instead, the Government brushes aside that finding on the ground that it purportedly rests on an impermissible concern for "decency" between the sexes. In reality, however, that finding reflects the actual experience of the service academies and is based on expert testimony demonstrating that it is unrealistic to expect late adolescents to engage in cross-gender harassment in an intense and pressure-laden environment without producing tensions and perceptions of unequal treatment that are wholly incompatible with the VMI method. Pet. App. 147a, 238a-41a. The coeducational setting inevitably entails sexual distractions and attractions, posturing, emotional involvements, and jealousies not found in a single-sex environment, and it ignores reality to ask young men and women to participate in institutionalized peer-induced stress and intimidation while avoiding the appearance of impermissible sexual harassment. *See* Va. Resp. Br. 45-46 & n.35.

The Government also contends that there is no governmental interest in preserving VMI's system in its present form. In making this contention, the Government seeks to have it both ways. On the one hand, it argues (Br. 13) that women are denied an important educational opportunity because they cannot enjoy the "unique" VMI program. On the other hand, it argues (*id.* at 29-30) that the changes required for VMI to become coeducational are inconsequential because no constitutional significance can be at-

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coeducation.

tached to those elements of VMI's method that would have to be rejected -- even though those elements are precisely what distinguishes VMI's system from the programs already offered to women at VPI and elsewhere. The Government's argument is at war with itself.

In any event, Virginia does have a legitimate and important interest in maintaining VMI's present system. As the record and findings below demonstrate (*see* Va. Br. 14-18, 26-28), VMI's program is particularly successful in educating the students who choose it, and both its single-sex nature and the adversative system are essential to that success. To be sure, other educational programs (like that at VWIL) can achieve equivalent results with other students, but VMI's program has been shown to be optimal for and attractive to a substantial number of male students (as VWIL's program has been shown to be for female students). The Government's insistence on coeducation would thus frustrate Virginia's legitimate interest in providing diverse educational opportunities in response to differing educational needs and interests and deny all students the opportunity to benefit from single-sex education.[15]

III. VMI'S SINGLE-SEX ADMISSIONS POLICY DOES NOT DENY EDUCATIONAL OPPORTUNITY TO WOMEN STUDENTS

The Government incorrectly contends (Br. 13) that cross-

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[15]The Government offers its opinion (Br. 31) that the benefits of attending VMI "would probably be enhanced, rather than diminished," if it were to become coeducational. That pronouncement, however, is impossible to square with the findings below. *See* Pet. App. 149a-51a, 176a, 225a. The Government's persistence in substituting its own unsubstantiated beliefs for the judgments of professional educators and the factual findings below underscores the Government's inability to prevail on the actual record in this case.

petitioners seek to preserve VMI "without offering any alternative whatever to women." Virginia provides women students an opportunity to receive a college education with public financial assistance at a wide variety of institutions, large and small, public and private, coeducational and single-sex. Those institutions offer to women every academic course and degree available at VMI and more, including the opportunity to receive military training and pursue a military career. And both the public institutions of higher education and the private single-sex colleges in Virginia (all of which receive substantial state financial assistance) enroll more women than men. *See* Va. Br. 5-10, 45-46.[16]

In addition, Virginia offers women the opportunity to participate in VPI's coeducational barracks-based Corps of Cadets program. While the VPI program does not replicate VMI's adversative method, it does place similar emphasis on physical and mental rigor, character development, and military training and discipline. *See* Va. Br. 9-10; Pet. App. 214a-18a; Stips. 49-53 (I JA 94-98; L. 76-80). The Government errs in asserting (Br. 29 n.27) that VPI "lacks the traditions, prestige and alumni ties that VMI enjoys." VPI has been listed among the Nation's finest undergraduate institutions, and its engineering program is one of the very best in the Nation. Stips. 41-42 (I JA 86-87; L. 68-69); U.S. NEWS & WORLD REP. 138 (Sept. 18, 1995). The VPI Corps also has a proud tradition of military service. VPI was designated as one of 12 "distinguished military

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[16]The Government argues (Br. 28 & n.26) that Virginia's extensive financial support for women attending private single-sex colleges is irrelevant, but offers no support for that counter-intuitive proposition. The Constitution reflects no preference for public over private education. As long as Virginia uses its tax-generated revenue to educate both men and women overall, the Equal Protection Clause is indifferent to the mix of public and private institutions used to offer those educational benefits.

colleges" by the War Department after World War I in recognition of the contributions made by its graduates, and VPI alumni have held numerous positions of senior leadership in the military and have received six Congressional Medals of Honor. Stips. 49-50 (I JA 94-95; L. 76-77).

The Government's claim thus reduces to the assertion that women cannot be denied access to the particular educational methodology offered at VMI. But that argument simply ignores the findings below that women will not obtain the benefits of VMI's methodology if VMI becomes coeducational. Instead, that methodology will inevitably be replaced by a system analogous to that already offered to women through the VPI Corps of Cadets.[17]

The Government challenges (Br. 33-35) cross-petitioners' showing that there is insufficient demand among women to make practicable a single-sex program utilizing VMI's ad-

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[17]The Government also argues that women are improperly denied the benefits of access to VMI's allegedly powerful alumni network. The only evidence cited to support the Government's exaggerated characterization of the influence of VMI's alumni is the remedial-phase testimony of one of its experts, Dr. Alexander Astin. *See* Br. 13 (citing II Tr. 1227-28); II Tr. 1237-38 (pages of transcript where cited testimony actually appears). Dr. Astin's testimony, however, was largely discredited by the district court. Pet. App. 70a-71a. And in any event, the Government points to no basis for believing that the influence of VMI's alumni approaches that of the graduates of other institutions in Virginia. Of the 140 members of the 1994-95 Virginia General Assembly, for example, twelve received their undergraduate degrees from VPI, eight from the College of William & Mary, seven from the University of Virginia, and only one from VMI. *See* MANUAL OF THE SENATE, GENERAL ASSEMBLY OF VIRGINIA 74-100 (1994-95); VIRGINIA HOUSE OF DELEGATES MANUAL 95-188 (1994-95).

versative method.[18] Cross-petitioners introduced extensive evidence to that effect, however, and the district court and court of appeals found that evidence persuasive. Pet. App. 27a, 73a, 75a n.12; *see* Va. Br. 43-44 & n.22; L. 300.[19]

This evidence demonstrates that Virginia better serves women students by devoting its scarce educational resources to programs of interest to larger numbers of them

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[18]The Government also claims (Br. 32 n.30, 33-34) that cross-petitioners waived this argument and that evidence introduced at the remedial phase should not be considered in reviewing the liability determination. The demand issue was fully litigated during the remedial phase, however, and this Court reviews "the entire case," not merely one portion of it. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). In any event, Virginia and VMI are respondents in No. 94-1941, and as such are entitled to defend the judgment below on any ground supported by the record. *See Schweiker v. Hogan*, 457 U.S. 569, 585 n.24 (1982); *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977); *see also* 94-1941 Br. in Opp. 18 n.15.

[19]The Government's attempt to reargue the facts is both improper and without merit. Even though the Nation's ROTC programs have been open to women for many years, the number of women attending even *non*-adversative residential military programs is quite small (250 nationwide in 1990), and interviews with women cadets reveal that only a tiny fraction of them would have considered an adversative program like VMI's. II Tr. 613-15 (II JA 743-45); I DX 62L (L. 233). Also significant is the fact that the experts in women's education who designed VWIL found little or no demand for a women's program identical to VMI. II Tr. 127, 340-41 (II JA 473, 598-99). The Government's reliance on female attendance at West Point is misplaced, both because West Point does not use the adversative method and because VMI (unlike West Point) cannot offer free tuition, room and board, and a salary to its students, nor can it guarantee them an active-duty commission upon graduation.

than it would by attempting to create a program for women identical to that offered to men at VMI, an attempt that would be doomed to fail because such a program could not attract the necessary critical mass of interested students. The Government's contrary argument rests entirely on cases involving *racial* discrimination. Unlike racial segregation, which is abhorrent, inherently suspect, and which offers no valid educational benefits, the gender classification at issue in this case provides substantial and proven educational advantages that would be lost if coeducation were required. The cases cited by the Government are irrelevant to a proper legal analysis of the issues in this case.[20]

IV. THE GOVERNMENT'S VIEW OF THE LAW WOULD EFFECTIVELY PRECLUDE ALL PUBLIC SUPPORT FOR SINGLE-SEX EDUCATION

The Government contends that adoption of its view of the law "will not . . . invalidate single-sex public education in all circumstances." Br. 26. It is unable, however, to point to any circumstance in which its approach would permit public single-sex education, with the "possible" exception of instances (now virtually nonexistent) in which single-sex education is necessary to "compensate" for past discrimination. *Id.* at 11. Thus, adoption of the Government's view of the law would necessarily lead to elimination of those public single-sex programs that now exist and frustrate the worthy efforts of public educators across the country who

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[20]Those cases are also inapposite because they do not involve situations in which the ability to offer a particular program depends on the willingness of a significant number of other individuals to participate in that same program. VMI's adversative method, which depends on the active participation of numerous students as leaders, disciplinarians, mentors, and peers, cannot possibly be implemented in the absence of a sufficient number of other students all seeking the same experience.

are achieving success with single-sex programs at all levels of the educational system.[21]

As previously explained (Va. Br. 41-42), the Government's strained reading of the Constitution also threatens the survival of private single-sex schools. The fact that public aid may not convert private colleges into state actors is irrelevant, because this Court has held that government *itself* violates the Constitution by providing educational aid to private schools whose discriminatory admissions policies would violate equal protection if practiced by the government. *E.g.*, *Norwood v. Harrison*, 413 U.S. 455 (1973).

The Government's attempt to distinguish *Norwood* is unpersuasive. That decision does not, as the Government would have it (Br. 37), rest on a determination that Mississippi "was under a federal desegregation order, and . . . therefore had an affirmative constitutional duty to dismantle its segregated system of education." To the contrary, the *Norwood* Court accepted the "finding that Mississippi's public schools '*were fully established as unitary schools*,'"

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[21]The Government asserts (Br. 26-27 n.25) that public single-sex education is "extremely rare," and that Title IX prohibits most single-sex classes in coeducational schools. It is beyond dispute, however, that the number of single-sex programs in public school districts across the Nation is increasing (*see* Va. Br. 39-41; *see also* Br. *Amici Curiae* of Women's Schools Together, Inc., at 21-22, 27-28 & n.41; Br. *Amici Curiae* of Dr. Kenneth E. Clark, *et al.*, at 12-13), and a bill is currently pending in Congress that would authorize additional experimentation with single-sex programs at the elementary and secondary levels. *See* S.B. 829 (introduced May 18, 1995, by Sen. Hutchison). The growing consensus among educators that single-sex education is optimal for some students in some settings suggests that this trend will continue unless the Government succeeds in mandating coeducation as the only permissible approach for all public schools.

but concluded that the State's compliance with constitutional requirements in its public school system did not justify its aid to discriminatory private schools. 413 U.S. at 467 (emphasis added).[22] Thus, the Government offers no colorable basis for its assertion that public aid to private single-sex schools could survive a ruling that the Equal Protection Clause prohibits public single-sex education like that offered at VMI and VWIL.[23]

CONCLUSION

The court of appeals' finding of liability should be rejected, and the judgment below should be affirmed on that ground.

January 3, 1996 Respectfully submitted.

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[22]The Government's reliance on *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), is equally unpersuasive. Indeed, the *Norwood* Court expressly distinguished *Moose Lodge* on the ground that it involved a form of generalized governmental assistance that could be obtained only from the State. 413 U.S. at 465. Unlike liquor licenses, police protection, and the like, public financial aid for students attending private single-sex colleges is "provided only in connection with schools" and is "a form of assistance readily available from sources entirely independent of the State." *Id.*

[23]Any attempt to distinguish *Norwood* would be particularly difficult if, as the Government now requests, strict scrutiny were to be applied to gender classifications. Of course, that issue is not properly presented in this case, and the Government cannot identify any sufficient basis for rejecting the intermediate-scrutiny standard for gender classifications. *See* Va. Resp. Br. 47-50.

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IN THE
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OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,
v.
COMMONWEALTH OF VIRGINIA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICI CURIAE OF WELLS COLLEGE, SOUTHERN VIRGINIA COLLEGE AND SAINT MARY'S COLLEGE SUPPORTING AFFIRMANCE

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10 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
SINGLE-GENDER EDUCATION PROVIDES SUBSTANTIAL EDUCATIONAL BENEFIT TO WOMEN	3
CONCLUSION	7

TABLE OF AUTHORITIES

Cases Page

Albert v. Carovano, 851 F.2d 561 (2d Cir. 1988).... 5
Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) 2, 6
Powe v. Miles, 407 F.2d 73 (2d Cir. 1968) 5
Rice v. President and Fellows of Harvard College, 663 F.2d 336 (1st Cir. 1981) 5
United States v. Commonwealth of Virginia, 44 F.3d 1229 (4th Cir. 1995) (*VMI II*) 2-4
United States v. Commonwealth of Virginia, 976 F.2d 890 (4th Cir. 1992) (*VMI I*) 2
United States v. Commonwealth of Virginia, 852 F.Supp. 471 (W.D. Va. 1994) 3
United States v. Commonwealth of Virginia, 766 F.Supp. 1407 (W.D. Va. 1991) 3

Articles

Marvin Bressler & Peter Wendell, *The Sex Composition of Selective Colleges and Gender Differences in Career Aspirations*, 51 J. Higher Educ. 650 (1980) 3
Mikyong Kim & Rodolfo Alvarez, *Women-Only Colleges: Some Unanticipated Conseqences*, 66 J. Higher Educ. 641 (Nov./Dec. 1995) 4
Daryl G. Smith, Lisa W. Wolf, and Diane E. Morrison, *Paths to Success: Factors Related to the Impact of Women's Colleges*, 66 J. Higher Educ. 245 (May/June 1995) 4
Growing Smart: What's Working for Girls in School, Report Commissioned by the American Association of University Women Educational Foundation, Executive Summary and Action Guide, Oct. 1995 4
"A Burst of Popularity," U.S. News & World Report, Sept. 26, 1994 4
Chronicle of Higher Education, Oct. 27, 1995 at A29 5-6

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BRIEF *AMICI CURIAE* OF WELLS COLLEGE, SOUTHERN VIRGINIA COLLEGE AND SAINT MARY'S COLLEGE SUPPORTING AFFIRMANCE

INTEREST OF *AMICI CURIAE*

Wells College, founded in 1868, is a private women's college located in Aurora, New York. Saint Mary's College, founded in 1842, is a private women's college located in Raleigh, North Carolina. Southern Virginia College, a private college located in Buena Vista, Virginia, has been dedicated to educating women since its founding in 1867. For more than a century, these schools have provided high quality education for women. Throughout their history, they have become enthusiastic supporters of the pedagogical value of single-gender education. In-

deed, Wells, Saint Mary's and Southern Virginia College believe that they and other single-gender educational institutions provide needed diversity in American post-secondary education.

Because *amici* are committed to the education of women in a single-gender environment, *amici* urge this Court to protect the ability of these institutions to continue to offer single-gender education.*

SUMMARY OF ARGUMENT

Amici Wells, Saint Mary's and Southern Virginia College are all private liberal arts colleges for women. These single-gender institutions provide excellent education in the liberal arts and offer an environment conducive to producing female leaders. Indeed, the Fourth Circuit Court of Appeals in this case twice affirmed the District Court's findings that single-gender educational opportunities are valuable for both males and females. Said the Court in this case:

> Thus, while the data support a pedagogical justification for a single-sex education, they do not materially favor either sex. Both men and women appear to have benefited from single-sex education in a materially similar manner.

United States v. Commonwealth of Virginia, 976 F.2d 890, 897-98 (4th Cir. 1992) (VMI I); *see also United States v. Commonwealth of Virginia*, 44 F.3d 1229, 1239 (4th Cir. 1995) (VMI II) (reaffirming that single-gender education benefits both sexes). Similarly, in *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), this Court also recognized the viability of single-gender education. *Id.* at 728, 732, n.17. This Court's decision in *Mississippi University for Women v. Hogan* and the

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* Petitioner/Cross-Respondent and Respondents/Cross-Petitioners consented to the filing of this brief. Copies of the consent letters have been filed with the Clerk.

District Court's findings in this case support the conclusion that there is a legitimate and important pedagogical justification for single-gender education.

Amici urge this Court to affirm that finding with respect to single-gender education and to construct a decision that will allow the continuation of single-gender education in the United States.

ARGUMENT

SINGLE-GENDER EDUCATION PROVIDES SUBSTANTIAL EDUCATIONAL BENEFIT TO WOMEN

As is amply demonstrated by the evidence considered by the District Court in this case, a large number of studies have confirmed the value and importance of single-gender education. *See, e.g.*, Marvin Bressler & Peter Wendell, *The Sex Composition of Selective Colleges and Gender Differences in Career Aspirations*, 51 J. Higher Educ. 650, 662 (1980), cited in the Circuit Court's opinion, *VMI I*, 976 F.2d at 897. Acknowledging the merit of these studies and the testimony supporting them, the District Court in this case found that men and women are treated differently in the classroom and women have more chances for leadership at single-sex institutions. *United States v. Commonwealth of Virginia*, 852 F.Supp. 471, 480 (W.D. Va. 1994). The District Court also found that the educational benefits flowing from a single-gender environment cannot be replicated in a coeducational setting. Thus, concluded the District Court, single-gender education adds an important measure of diversity in an overall educational system. *United States v. Commonwealth of Virginia*, 766 F. Supp. 1407, 1415 (W.D. Va. 1991).

The Circuit Court in this case expressly adopted the District Court's factual findings, concluding that single-gender education "yields concrete educational benefits." *VMI II*, 44 F.3d at 1239. In reaching its conclusion, the Circuit Court stated:

> This should not be surprising in light of common experience that a sex-neutral atmosphere can be less distracting to late adolescents in an educational setting where the focus is properly on matters other than relationships between the sexes.

VMI II, 44 F.3d at 1238.

Based on the factual record before it, the Fourth Circuit Court held:

> Just as a state's provision of publicly financed education to its citizens is a legitimate and important governmental objective, so too is a state's opting for single-gender education as one particular pedagogical technique among many.

VMI II, 44 F.3d at 1239.

In fact, several studies published since the Fourth Circuit Court's ruling confirm its conclusion that single-gender education offers significant advantages when compared to coeducation. *See, e.g.*, Mikyong Kim & Rodolfo Alvarez, *Women-Only Colleges: Some Unanticipated Consequences*, 66 J. Higher Educ. 641 (Nov./Dec. 1995); Daryl G. Smith, Lisa W. Wolf, and Diane E. Morrison, *Paths to Success: Factors Related to the Impact of Women's Colleges*, 66 J. Higher Educ. 245 (May/June 1995); *see also Growing Smart: What's Working for Girls in School*, Report Commissioned by the American Association of University Women Educational Foundation, Executive Summary and Action Guide, Oct. 1995. The popular press has echoed these conclusions, reporting that women's colleges produce successful leaders in the workplace. *See, e.g.*, "A Burst of Popularity," U.S. News & World Report, Sept. 26, 1994, at 105, cited in the Circuit Court's opinion, *VMI II*, 44 F.3d at 1238-39.

Despite the Circuit Court's conclusions in this case and this Court's holding in *Mississippi University for Women*, several commentators and *amici* supporting the government assert that public support of any kind of single-

gender education is unconstitutional. They urge this Court to adopt a strict scrutiny standard and measure every institution according to that standard. *See* Brief of *Amici Curiae* National Women's Law Center, et al., On Petition for Writ of Certiorari, *U.S. v. Virginia, cert. granted*, —— U.S. ——, 116 S.Ct. 281 (1995), p. 9. Single-gender education, they claim, can be supported only as remedial action on behalf of women, not because single-gender education is valuable standing by itself.

The implication is that even a private institution will be unable to offer single-gender education if it receives federal financial assistance, state aid, or merely a state or federal tax exemption. Indeed, since *Grove City College v. Bell*, 465 U.S. 555 (1984), and the resulting amendments to Title IX, the government has maintained consistently that federal jurisdiction over the entire institution is triggered if a private institution receives any public financial assistance, direct or indirect. Although the Second Circuit Court of Appeals (the Circuit in which Wells is located) twice reaffirmed that such government funding does not transform a private institution into a public one, *Albert v. Carovano*, 851 F.2d 561 (2d Cir. 1988); *Powe v. Miles*, 407 F.2d 73 (2d Cir. 1968); *accord Rice v. President and Fellows of Harvard College*, 663 F.2d 336 (1st Cir. 1981), the government and its supporting *amici* seem to suggest that a private institution, by accepting public benefits or taxpayer largess, becomes subject to the same constitutional scrutiny as public institutions. Thus, they argue, traditionally private institutions will be unable to offer single-gender education.

Amici do not believe that this Court has made any such ruling. Already, however, lawsuits are emerging to test this argument and the viability of single-gender admissions policies at private institutions. A District Court in Georgia may soon be adjudicating the rights of a male applicant seeking admission to Spelman College, a private women's college in Atlanta, Georgia. The Chronicle of

Higher Education (Oct. 27, 1995, at A29) reports the male applicant asserts that because Spelman receives federal financial assistance, it cannot discriminate against men in its admissions policy without violating Title IX. Thus, the issue of how far this Court's ruling in this case will extend is already being raised. Similarly, the U.S. Education Department is reviewing a complaint filed recently against Converse College, a private women's college in South Carolina. Converse is the college where a program similar to the one at Mary Baldwin College (discussed in the record in this case) has been established. The complaint challenges the College's receipt and use of state funds to create a new, single-gender leadership program for women, urging that this aid makes the institution a public one that is subject to Title IX's prohibition on discrimination in admissions.

Contrary to the arguments urged by the government and its supporters in this case, *amici* believe strongly that private women's colleges are protected by Title IX and the U.S. Constitution. Recognizing, however, that almost every private, single-gender institution could not survive without public funds, *amici* urge that this Court clear any remaining doubt. This Court's decision in *Mississippi University for Women* and the District Court's findings in this case support the holding that providing the option of a single-gender college education is a legitimate and important aspect of both a public and private system of higher education.

Against such a background, this Court cannot allow a misinterpretation of its holding in *Mississippi University for Women, supra.* Instead, it should reaffirm the value of single-gender education, hold firmly and clearly that it has its place in the American higher education system, and rule that educationally successful institutions like *amici* may constitutionally offer single-gender education.

CONCLUSION

For the foregoing reasons, the Court should affirm the Fourth Circuit Court's decision upholding the constitutionality of the proposed single-gender remedial plan.

Respectfully submitted,

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Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

AMICUS BRIEF OF NANCY MELLETTE IN SUPPORT OF PETITIONER UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES i

INTEREST OF AMICUS NANCY ELIZABETH MELLETTE 1

The Importance of The Citadel in South Carolina 2

The District Court Decision in the Citadel Case 4

The Court of Appeals' Decision in the Citadel Case 6

South Carolina's Defective Remedial Proposal 7

SUMMARY OF ARGUMENT 9

I. THE HISTORICAL EXCLUSION OF QUALIFIED WOMEN FROM A PRESTIGIOUS PUBLIC PROGRAM OF HIGHER EDUCATION, SOLELY ON THE BASIS OF THEIR SEX, VIOLATES EQUAL PROTECTION 11

A. *VMI and The Citadel Are Prestigious Military-Style Colleges That Offer Male Graduates Unique and Intangible Benefits* 11

B. *The Exclusion of Qualified Women from a Public Program of Higher Education is Not Substantially Related to an Important Governmental Objective* 13

1. *The Wholesale Exclusion of Women From VMI Is Based On Stereotypical and Impermissible Generalizations* 15

2. *The Assertion that the Admission of Women Will "Change" VMI Is Not Constitutionally Sufficient to Deny Women a Military-Style Education* 15

3. Virginia Cannot Deny Women a Unique Military-Style Education Under a Supposed Policy of "Diversity" or "Single-Sex Education" 17

II. VIRGINIA'S DECISION TO CONTINUE THE EXCLUSION OF WOMEN FROM VMI AND SEGREGATING WOMEN IN A SEPARATE AND INTENTIONALLY UNEQUAL PROGRAM COMPOUNDS THE ORIGINAL VIOLATION 18

A. The Decisions Below Rest Upon Outmoded Stereotypes and Generalizations About Women That This Court Repeatedly Has Rejected 18

B. The Fourth Circuit Failed to Subject Virginia's Asserted Objective to Heightened Scrutiny as Required Under Hogan 19

C. Virginia Cannot Remedy the Invidious Exclusion of Women from VMI by Creating a Separate and Intentionally Unequal Program That Lacks the Prestige, Tradition, or Reputation Offered at VMI 23

D. The Only Constitutional Remedy Is To Admit Qualified Women to VMI 24

III. THIS CASE OFFERS THE COURT AN OPPORTUNITY TO ANSWER THE UNRESOLVED QUESTION OF WHETHER STRICT SCRUTINY APPLIES TO GENDER CLASSIFICATIONS 25

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

STATUTES

S.C. Code Ann. § 59-103-35 8

CASES

Adarand Constructors, Inc. v. Pena,
115 S. Ct. 2097 (1995) 10, 15, 28
Alexander v. Holmes County Bd. of Educ.,
396 U.S. 19 (1969) 24
Brown v. Board of Educ., 347 U.S. 483 (1954) 7, 24
Califano v. Webster, 430 U.S. 313 (1977) 14
Cleburne v. Cleburne Living Ctr.,
473 U.S. 432 (1985) 26, 27
Conlin v. Blanchard, 890 F.2d 811 (6th Cir. 1989),
aff'd, 947 F.2d 944 (6th Cir. 1991) 28
Connecticut v. Teal, 457 U.S. 440 (1982) 23
Contractors Ass'n of Eastern Pa. v. City of Philadelphia,
734 F. Supp. 1274 (E.D. Pa. 1990) 27
Coral Constr. Co. v. King County, 941 F.2d 910
(9th Cir. 1991) 27, 28
Plessy v. Ferguson, 163 U.S. 537 (1896) 11
Craig v. Boren, 429 U.S. 190 (1976) 28
Faulkner v. Jones, 51 F.3d 440 (4th Cir. 1995) ..... passim
Faulkner v. Jones, 10 F.3d 226 (4th Cir. 1993) 17
Faulkner v. Jones, 858 F. Supp. 552 (D.S.C. 1994) .... passim
Florida ex rel. Hawkins v. Board of Control,
350 U.S. 413 (1956) 24
Frontiero v. Richardson,
411 U.S. 677 (1973) 14, 22, 26, 27, 29
Harris v. Forklift Sys. Inc., 114 S. Ct. 367 (1993) 26
J.E.B. v. Alabama ex rel. T.B.,
114 S. Ct. 1419 (1994) ..... passim
Kahn v. Shevin, 416 U.S. 351 (1974) 14
Lamprecht v. F.C.C., 958 F.2d 382 (D.C. Cir. 1992) 27

Cases (continued)	Page(s)
Mathews v. Lucas, 427 U.S. 495 (1976)	27
McKissick v. Carmichael, 187 F.2d 949 (4th Cir. 1951), *cert. denied*, 341 U.S. 951 (1951)	19
McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637 (1950)	23
Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982)	passim
Mississippi v. Hall, 187 So. 2d 861 (Miss. 1966), *appeal dismissed*, 385 U.S. 98 (1966)	19
Muller v. Oregon, 208 U.S. 412 (1908)	19
Plessy v. Ferguson, 163 U.S. 537 (1896)	9
Reed v. Reed, 404 U.S. 71 (1971)	20
Richmond v. J.A. Croson Co., 488 U.S. 469 (1989)	28
Schlesinger v. Ballard, 421 U.S. 906 (1975)	14
Sipuel v. Board of Regents, 332 U.S. 631 (1948)	24
Stanton v. Stanton, 421 U.S. 7 (1975)	26
Sweatt v. Painter, 339 U.S. 629 (1954)	14, 23
United States v. Commonwealth of Virginia, 52 F.3d 90 (4th Cir. 1995)	11, 12, 25
United States v. Commonwealth of Virginia, 44 F.3d 1229 (4th Cir.)	passim
United States v. Commonwealth of Virginia, 852 F. Supp. 471 (1994), *aff'd*, 44 F.3d 1229 (4th Cir. 1995)	23, 24
United States v. Commonwealth of Virginia, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993)	passim
United States v. Commonwealth of Virginia, 766 F. Supp. 1407 (W.D. Va.)	11, 15, 16
United States v. Fordice, 505 U.S. 717 (1992)	13
Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970), *aff'd*, 401 U.S. 951 (1971)	13

Page(s)

MISCELLANEOUS

T. Aleinkoff, *A Case For Race-Consciousness*, 91 Colum. L. Rev. 1060 (1991) 28

S. Oliver, Jr., *A Survey of Post-Croson Devs.*, 38 Loyola L. Rev. 7 (1992) 28

INTEREST OF AMICUS NANCY ELIZABETH MELLETTE

Nancy Mellette is a South Carolina resident who has applied for admission to The Citadel, the Military College of South Carolina.[1] The Citadel is a public military-style college, set in a large campus in Charleston, South Carolina, which has excluded women since its founding in 1842. Ms. Mellette has long wished to join The Citadel's Corps of Cadets and is qualified in all respects for admission to the Corps, other than gender. She is now in her senior year of high school at Oak Ridge Miliary Academy, a military boarding school in Oak Ridge, North Carolina. She is a second lieutenant in her cadet cadre, ranks fourth in her class, and holds eleven letters in various sports. Ms. Mellette's father attended The Citadel; her brother is currently a senior at The Citadel.

The exclusionary policy of The Citadel was initially challenged by Shannon Faulkner. *Faulkner v. Jones*, 858 F. Supp. 552 (D.S.C. 1994) ("*Faulkner I*"). Ms. Faulkner pursued her claim and was ultimately admitted to The Citadel as a cadet in August 1995. *Faulkner v. Jones*, 51 F.3d 440 (4th Cir. 1995) ("*Faulkner II*"). After Ms. Faulkner withdrew, Ms. Mellette successfully moved to intervene in the *Faulkner* action, which she is continuing to prosecute.

The decisions of the Fourth Circuit relating to the Virginia Military Institute ("VMI"), *United States v. Commonwealth of Virginia*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993) ("*VMI I*") and *United States v. Commonwealth of Virginia*, 44 F.3d 1229 (4th Cir. 1995) ("*VMI II*"), have provided controlling authority in the *Faulkner* litigation against The Citadel. Ms. Mellette consequently has a very substantial interest in the outcome of this Court's review of *VMI*.

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[1] The parties' written consent to the filing of this brief has been filed with the Court.

The Importance of The Citadel in South Carolina

The Citadel is the only public institution of higher education in South Carolina that offers a military-style education; it is also the only public institution that is sex-segregated. *Faulkner I*, 858 F. Supp. at 556. As the president of The Citadel has testified, The Citadel, which currently has approximately 1600 cadets, offers a regimented military structure and "no other institution in South Carolina offers an equivalent experience." Supplement to Joint Appendix filed in the *Faulkner* litigation in the Fourth Circuit ("JA Supp."), Exh. K at 92-97; 99-100.

Since its founding more than 150 years ago, The Citadel has played a central role in the history of South Carolina. For example, The Citadel's alumni include a sitting United States senator, multiple former governors of South Carolina, a United States ambassador, two sitting federal court judges, a sitting justice on the South Carolina Supreme Court, and the current president of the University of South Carolina, as well as numerous state legislators, prominent business leaders and senior military officers.

Like VMI, The Citadel offers its male students the invaluable benefits of its prestige, access to a powerful and influential alumni network, a rich endowment and other resources that are unparalleled in South Carolina. *See Faulkner II*, 51 F.3d at 450-51 (Hall, J. concurring). The accomplishments and prestige of The Citadel's alumni make it attractive to women as well as to men.

The Citadel admits that women could perform just as well as its male cadets and would benefit tremendously from its rigorous military-style program. Joint Appendix filed in the *Faulkner* litigation in the Fourth Circuit ("JA"), JA 237-238; JA 739. Unlike VMI, The Citadel's witnesses concede that The Citadel would still be able to fulfill its mission if women were admitted. JA 730-731.

Since the commencement of this lawsuit, Citadel alumni in positions of power in South Carolina have waged an aggressive campaign to preserve The Citadel as an all-male institution. Following the denial of VMI's petition for certio-

rari in *United States v. Commonwealth of Virginia*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993), several influential alumni met with representatives of The Citadel and its counsel to organize an effort to persuade the South Carolina general assembly to concoct a resolution to support The Citadel's discriminatory admissions policy. A prominent Citadel alumnus drafted a concurrent resolution, which has no force of law, that closely tracked the arguments made by counsel for The Citadel. Five Citadel alumni in the General Assembly sponsored the resolution.

Pursuant to the resolution, a legislative committee was formed for the ostensible purpose of reviewing existing opportunities for single-sex education for women in South Carolina, and making recommendations to the General Assembly. The Speaker of the House appointed a former member of The Citadel's governing board; six of its ten members also were graduates of The Citadel. Not surprisingly, the committee endorsed The Citadel remaining all-male and suggested that South Carolina consider providing opportunities for single-sex education for women. Neither the General Assembly, nor any state official, voluntarily has made any effort to address the absence of equal opportunities for women in South Carolina.

To the contrary, South Carolina repeatedly refused to comply with court orders to file a specific remedial proposal. In February, 1994, the South Carolina district court ordered that defendants file a remedial proposal by April 1, 1994. The district court ordered a hearing on the unresolved factual issues in the case. Given the Fourth Circuit's decision in *VMI I*, the district court limited the issues to be tried to (1) whether defendants could articulate any fact or argument that distinguished this case from the decision in *VMI I*; and (2) if liability were found, the appropriate remedy for the violation of the rights of Ms. Faulkner and other similarly situated women. The Citadel defendants unsuccessfully sought to postpone filing a remedial plan until *after* a trial on liability. After the district court denied their request, South Carolina filed a proposal unilaterally declaring that it would submit a remedial plan 60 days after a finding of liability.

The District Court Decision in the Citadel Case

Following a two-week hearing on liability and remedy, the District Court issued its opinion on July 22, 1994 holding that The Citadel's males-only admission policy violates the right of Ms. Faulkner and other women to equal protection under the law as guaranteed by the Fourteenth Amendment. *Faulkner I*, 858 F. Supp. at 566. The district court found that South Carolina had refused to propose or develop any remedial plan, as it required, and ordered the immediate admission of Ms. Faulkner into the Corps of Cadets.

In its decision, the district court found that "[t]he unique feature of The Citadel is the requirement that all undergraduate day students be members of the South Carolina Corps of Cadets, subject to military discipline at all times, and enrolled in programs of study which qualify graduates for commissions in the active or reserve armed forces." *Id.* It further found that "[t]he type of education available at The Citadel is not available at any other institution in South Carolina." *Id.*

The district court expressly rejected defendants' argument that the exclusion of women from The Citadel was justified by a state policy favoring single-sex education, where sufficient demand existed, as part of a diverse educational system. Despite the defendants' request, the District Court made no finding that South Carolina had a policy of providing single-sex education; instead, the district court found that all of the formerly single-sex public colleges in the state had become coeducational, except for The Citadel. The district court refused to admit the legislative committee report into evidence, finding that it lacked trustworthiness because of the control of Citadel alumni over the committee and its report. Trial Transcript dated 5/27/94 at 63-64.

Turning to remedy, the District Court found that the only available remedy to redress the violation of Ms. Faulkner's rights was to order her immediate admission into the Corps of Cadets program. *Faulkner I*, 858 F. Supp. at 568. The district court found that defendants refused to propose or develop any remedial plan while still doing their utmost to keep

Ms. Faulkner out of The Citadel. The district court found that "no effort has been made to determine the feasibility of any specific remedy" or even contact the state legislature about the plan. *Id.* The district court further found that "[n]ot once has a defendant done anything to indicate that it is sincerely concerned to any extent whatsoever about Faulkner's constitutional rights." *Id.* at 567. It concluded that:

> [A]ll of the actions witnessed by this court clearly and unequivocally indicate that the defendants would exert all of their considerable influence to insure that Faulkner would never have the opportunity to enroll in such a parallel institution or program.

Id. at 568.

The district court ordered defendants to (i) immediately admit Ms. Faulkner, and (ii) admit all other qualified women for the 1995-96 school year unless defendants filed a remedial plan to address the violation of their rights, and implement such a proposal by August 1995.

Significantly, the district court did not permit the parties to present any evidence on the purported benefits of single-sex education or the effect of the admission of women into The Citadel. Ms. Faulkner and the District Court accepted the findings and conclusions of *VMI I* as binding *solely* for the purposes of determining unresolved factual issues raised by Ms. Faulkner's motion for summary judgment. The district court specifically reserved Ms. Faulkner's right to challenge at a future trial the alleged value of single-sex education, the asserted pedagogical value of The Citadel, or any other issue that distinguishes The Citadel from VMI. *Faulkner I*, 858 F. Supp. at 555 n.5.

The Court of Appeals granted defendants' application for a stay in a 2-1 decision, without opinion. Order of the United States Court of Appeals for the Fourth Circuit dated August 12, 1994. Judge Hall filed a dissenting opinion. *Id.*

On October 4, 1994, South Carolina filed yet another "plan to plan" for a remedial proposal which did not specify any particular program or even select a host institution. The district court advised defendants that their so-called "plan" was incapable of review.

The Court of Appeals' Decision in the Citadel Case

On April 13, 1995, the Fourth Circuit affirmed the liability determination of the district court, but modified the remedial order. *Faulkner II*, 51 F.3d 440 (4th Cir. 1995) It held that The Citadel's males-only admission policy violates the right of Ms. Faulkner and other qualified young women to equal protection in that South Carolina provides men with a unique and valuable military-style education at The Citadel, but denies women any comparable opportunity. *Faulkner II*, 51 F.3d at 451 (Hall, J. concurring). The Court of Appeals ruled that defendants failed to offer any remedy for the violation of Ms. Faulkner's rights and that their actions "clearly and unequivocally" indicated that they would use "all of their considerable influence" to ensure that Ms. Faulkner was excluded from any remedial plan. *Id.* at 446-47. It held that defendants had been on notice since 1992, when the Fourth Circuit held VMI's males-only admission policy unconstitutional, that South Carolina must adopt a remedy. *Id.* at 447.

While the Court of Appeals recognized that many women could perform as well as men at VMI and The Citadel, it modified the district court order to permit South Carolina yet another opportunity to propose a separate program for women before August 1995. It also held that, under *VMI II*, South Carolina could remedy the equal protection violation by creating a separate, non-military program for women that differs "in form and detail" from The Citadel's Corps of Cadets program. *Id.* at 443.

In a concurring opinion, Judge Hall stated his view that the only remedy possible was the integration of women into The Citadel. Judge Hall disagreed with the principles in *VMI I* and *VMI II*, saying that while he was bound to respect the precedents of the Fourth Circuit, "I am convinced that we have

embarked on a path that will inevitably fall short of providing women their deserved equal access to important avenues of power and responsibility." *Faulkner II*, 51 F.3d at 450 (Hall, J. concurring). He concluded that, under *Brown v. Board of Education*, 347 U.S. 483 (1954) ("*Brown I*"), "the opportunity of an education[,] . . . where the state has undertaken to provide it, is a right which must be made available to all on equal terms . . . . Separate educational facilities are inherently unequal." *Id.* at 451.

In his *Faulkner* concurrence, Judge Hall wrote that the Fourth Circuit decisions in *VMI* "promoted a means to an end — single gender education — to the status of an end in itself and avoided ascertaining, let alone analyzing, the true purpose behind the state's decision to keep women out of VMI." *Id.* He rejected Judge Niemeyer's assumption that *Faulkner* and *VMI* are about single-gender education, concluding instead that they "have very much to do with wealth, power, and the ability of those who have it now to determine who will have it later." *Id.* He explained:

> The daughters of Virginia and South Carolina have every right to insist that their tax dollars no longer be spent to support what amount to fraternal organizations whose initiates emerge as full-fledged members of an all-male aristocracy . . . . As we prepare, together, to face the twenty-first century, we simply cannot afford to preserve a relic of the nineteenth.

Id.

South Carolina's Defective Remedial Proposal

Prompted by the pending admission of Ms. Faulkner into the Corps of Cadets, as a result of the Fourth Circuit decision, Citadel alumni donated $5 million from the Citadel Development Foundation to entice Converse College, a private women's college, to agree to provide a non-military "parallel" program for women. South Carolina's Proposed Reme-

dial Plan dated 6/5/95 at 8-9. In addition, Citadel alumni who were members of the South Carolina General Assembly sponsored an amendment to the state budget bill allocating $1.4 million to fund initial capital and operating costs for the Converse program. Journal of the Senate of the State of South Carolina dated 5/4/95. The Citadel's full-time lobbyist, a state employee, worked with the alumni to insure passage of the legislation. Legare deposition transcript dated 10/4/95 at 23. To circumvent a state statute that only permits a public college to employ one lobbyist, The Citadel arranged for the Association of Citadel Men, another alumni organization, to hire three additional lobbyists to ensure the adoption of the legislation. *Id.* at 102.

Under South Carolina law, the supplemental appropriation of funds for the Converse plan required approval of the Commission of Higher Education. S.C. Code Ann. §59-103-35. The General Assembly approved the legislation, which was part of the state budget bill, before specific requirements or substance of the Converse plan were even developed. During a ten-hour floor debate, Glenn McConnell, a Charleston state senator, warned that a vote against funding the Converse plan "would spell the death of The Citadel as we know it." Transcript of district court 7/19/95 hearing at 115. Under the legislation, South Carolina is not obligated to fund any portion of the Converse program unless and until the Fourth Circuit approves the remedial proposal. Agreement between the State of South Carolina and Converse College, exhibit 3 to South Carolina's Proposed Remedial Plan at 3-4.

Rather than reflecting a genuine commitment to expanding educational opportunities for women, the legislation specifically provides that the expression of a state "policy" for single-sex education is null and void if the Supreme Court issues an order admitting women into VMI. Journal of the Senate of the State of South Carolina dated 5/4/95. In addition, the continued operation of the Converse program is dependent upon The Citadel contributing an additional $3 million to Converse to cover its necessary expenses during the first four years of the program's operation. Agreement be-

tween Converse College and The Citadel, exhibit 12 to South Carolina's Proposed Remedial Plan at 3-4. Of the total $11.4 million required to operate the program, The Citadel and its alumni will fund $8 million.

The Citadel defendants contend that the Fourth Circuit in *VMI I* and *VMI II* held as a matter of law that single-sex education is valuable and that the admission of women to The Citadel would materially change its program. They have filed numerous motions to limit the issues at trial to (1) whether the program has the same mission and goals as The Citadel; and (2) whether it is intended to achieve the same outcomes as The Citadel. The district court has scheduled a trial commencing on December 4, 1995 to review South Carolina's remedial plan.

SUMMARY OF ARGUMENT

The decision below reinvokes the wholesale exclusion of an entire class of persons from unique and prestigious public institutions of higher education that has not been countenanced by this Court since *Plessy v. Ferguson*, 163 U.S. 537 (1896), when separate educational facilities for African-Americans were lawful. In *VMI I*, the Fourth Circuit held that VMI's males-only admission policy was not substantially related to an important governmental interest. While the Fourth Circuit found that "some women would qualify for and benefit from" VMI, it nevertheless refused to require their admission "in light of the generally recognized benefits that VMI offers men and the changes that would occur if women were admitted." *VMI I*, 976 F.2d at 846, 900. In *VMI II*, the Fourth Circuit authorized Virginia to remedy the discriminatory exclusion of women from VMI's rigorous military-style program by creating a brand-new program for women at Mary Baldwin College (the "VWIL" program), which the district court found failed the "separate but equal" test in *Plessy*. While the Fourth Circuit conceded that the Mary Baldwin program "lacked the prestige and benefits of a degree from VMI," it ruled that VWIL seeks to teach women leadership and therefore is "suf-

ficiently comparable" to justify the preservation of VMI as an all-male college. *VMI II*, 44 F.3d at 1241.

Given the widespread integration of women into the military, the notion that women would "destroy" VMI is based neither on fact nor reasoning, but on prejudicial beliefs about the proper role and interests of women that are "relic[s] of the nineteenth [century]." *Faulkner II*, 51 F.3d at 451 (Hall, J. concurring). In authorizing a segregated and manifestly inferior program for women, the Fourth Circuit relied upon stereotypical and overly broad generalizations about "differences" in the "educational needs" of "most" women and men reminiscent of those used to justify racial segregation. In *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2112 (1995), this Court reaffirmed "the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups." *VMI II* violates this fundamental principle, denying qualified women like Nancy Mellette a military-style college solely because of their membership in a group which, like African-Americans, historically has been denied access to important avenues of power and opportunity.

Moreover, the holding in *VMI II* that colleges can reach similar results with different methods necessarily precludes a finding that the exclusion of women from VMI is substantially related to an important governmental objective. If the Fourth Circuit is correct, then The Citadel and VMI can achieve similar outcomes even if the admission of women required certain accommodations in their educational method. On the other hand, if the adversative method is essential to the nature of The Citadel or VMI, then a non-adversative program for women cannot be either equal or comparable. The Fourth Circuit in effect uses a double standard in measuring equal protection: men are entitled to a unique educational methodology offered by The Citadel, unsullied by the presence of women, but women are merely entitled to "comparable outcomes."

This case is not about Virginia's failure to provide women with "single-sex education," nor is it about a classification based upon "homogeneity of gender," as suggested in *VMI II*.

VMI II, 44 F.3d at 1233. It is about the historical exclusion of women from a unique and prestigious state military college. It is about the influence and political clout of VMI (and Citadel) alumni, who together have contributed nearly $15 million to preserve their alma mater "from the unwelcome intrusion of women." *See United States v. Commonwealth of Virginia*, 52 F.3d 90, 92 n.3 (Motz, J. dissenting from denial of rehearing en banc). It is about "wealth, power, and the ability of those who have it now to determine who will have it later." *Faulkner II*, 51 F.3d at 451 (Hall, J. concurring).[2] Women like Nancy Mellette who are qualified for the rigors of the military program at VMI are entitled not merely to a "comparable education" at another college, but to "equal access to important avenues of power and responsibility" that VMI offers its male graduates and alumni. *Id.*

I

THE HISTORICAL EXCLUSION OF QUALIFIED WOMEN FROM A PRESTIGIOUS PUBLIC PROGRAM OF HIGHER EDUCATION, SOLELY ON THE BASIS OF THEIR SEX, VIOLATES EQUAL PROTECTION

A. VMI and The Citadel Are Prestigious Military-Style Colleges That Offer Male Graduates Unique and Intangible Benefits

VMI is a military college with a "distinctive educational method" that is "unique in all the world." *United States v. Commonwealth of Virginia*, 766 F. Supp. 1407, 1415 (1991). It offers an "intensity of the barracks-centered lifestyle that makes VMI so attractive to many applicants, and so important to its graduates." *Id.* at 1414. Since its founding, VMI

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[2] Nor is this a case about compensatory educational programs for historically disadvantaged groups. Virginia does not assert that the sex-segregated programs proposed in this case or The Citadel case are an affirmative attempt to rectify historical discrimination against women.

has occupied a prominent place in the military history of Virginia. In the first sentence of the district court opinion finding VMI's males-only policy constitutional, Judge Kiser described the historical role of VMI cadets in the Civil War when they confronted the United States in May of 1864. *Id.* at 1408.

Today, VMI remains a prestigious institution which offers its alumni access to a wealth of political and socioeconomic opportunities. A VMI education does not merely train men to become "citizen-soldiers," it bestows a prestigious degree that serves as an entree into an alumni network with "powerful political and economic ties." *VMI II*, 44 F.3d at 1250. Even the majority panel in *VMI II* conceded that VMI offers its graduates the invaluable benefits of its prestige and reputation. *Id.* at 1241.

VMI was not founded as a "single-sex" institution, but as a military college for men only. Since its founding in 1839, VMI admitted only men, not because of any "pedagogical" belief in "single-sex" education, but because women were excluded from the military. As Judge Phillips points out:

> When Virginia Military Institute was founded in 1839 as a state-supported military school for men only, it is inconceivable that any thought was given by the founders to the possibility that women should not be denied its intended benefits. No conscious governmental choice between alternatives therefore dictated the original men-only policy; it simply reflected the unquestioned general understanding of the time about the distinctively different roles in society of men and women.

44 F.2d at 1243 (Phillips, J. dissenting). "Single-gender education" is not an educational method at VMI, "it is, at best, a stratagem to achieve the Commonwealth's real objective - preservation of VMI . . . from the unwelcome intrusion of women." *VMI*, 52 F.3d 90, 92 (4th Cir. 1995) (Motz, J. dissenting).

While The Citadel employs a different methodology than VMI in its military program, it similarly occupies a unique

place in the history and tradition of South Carolina. According to the South Carolina Commission on Higher Education, a "unique feature" of The Citadel is "the requirement that all undergraduate day students be members of the South Carolina Corps of Cadets, subject to military discipline at all times, and enrolled in programs of study which qualify graduates for commissions in the active or reserve armed forces." *Faulkner I*, 858 F. Supp. at 556 (citing Commission for Higher Education Master Plan). The Citadel was founded in 1842 as the military college of South Carolina.

Because The Citadel is designated as a military college, the legislature "deemed it appropriate" to exclude women. *Williams v. McNair*, 316 F. Supp. 134, 136 (D.S.C., 1970), *aff'd by divided court without written opinion*, 401 U.S. 951 (1971). Prior to litigation against The Citadel, there was no document or written policy of South Carolina discussing the supposed benefits of "single-gender education." The claim now made by South Carolina that it has a "policy" of supporting "single-gender" education is entirely a contrived post-litigation rationalization. In fact, the defendants in the Citadel litigation have conceded that, prior to the commencement of litigation, no study of the alleged value of "single-gender education" had ever been done by South Carolina or The Citadel.

B. The Exclusion of Qualified Women from a Public Program of Higher Education is Not Substantially Related to an Important Governmental Objective

In *Brown I*, 347 U.S. 483 (1954), this Court recognized that "education is perhaps the most important function of state and local governments." This Court held that "the opportunity of an education[,] . . . where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Id.* at 488; *see also United States v. Fordice*, 505 U.S. 717 (1992). This Court repeatedly has held that the opportunity for a public education is not limited to the tangible components of a program, such as the physical facilities or course offerings. Educational opportunity includes access to those qualities "that make for greatness in a . . .

school," including the ability to develop working relationships with one's peers. *Sweatt v. Painter*, 339 U.S. 629, 634 (1954).

Under intermediate scrutiny, this Court has never upheld a state classification that perpetuates the historical exclusion of women from public higher education. This Court repeatedly has recognized that women have suffered a "long and unfortunate history of sex discrimination," including in public education, where they still face "pervasive" discrimination. *See J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1425 (1994) (citing *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973); *see also Mathews v. Lucas*, 427 U.S. 495 (1976) (historic legal and political discrimination based upon sex, like discrimination based on race, has been severe and pervasive). The decision to deny qualified students access to public education solely on the basis of their sex is unlawful absent "an exceedingly persuasive justification." *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). This Court consistently has rejected sex-based classifications that have disadvantaged women, and only occasionally upheld classifications which serve women with a "benign and compensatory purpose." *See, e.g., Califano v. Webster*, 430 U.S. 313 (1977); *Schlesinger v. Ballard*, 421 U.S. 906 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974).

In *Hogan*, this Court struck down the female-only admission policy of the Nursing School of Mississippi University for Women ("MUW"), even though Mississippi offered men a comparable nursing program less than thirty miles away. While the dissent in *Hogan* wrote that offering the choice of single-sex education for women was valuable, this Court required Mississippi to prove that its discriminatory classification "is substantially related to an important governmental objective." *Hogan*, 458 U.S. at 721-722. This Court rejected Mississippi's argument that MUW's single-sex program compensated women for past discrimination in education. This Court held that women were overrepresented in nursing, and that MUW's female-only admission policy reinforced traditional stereotypes of the proper roles of men and women.

There is no principled reason that the same result should not obtain here. While a state might justify a program for women that was narrowly tailored to compensate women for past discrimination, the historical exclusion of women from the prestige and opportunities offered men at VMI plainly does not serve any compensatory purpose.

1. The Wholesale Exclusion of Women From VMI is Based On Stereotypical and Impermissible Generalizations

The decision below is based upon generalizations and stereotypes expressly prohibited by this Court in *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994), *Hogan*, and other cases. Even if there is some statistical support for the argument that some women (and men) might benefit from a non-military program, a state may not exclude qualified women from VMI based simply upon a finding that most women (and men) are physically or psychologically unfit to participate in a military-style program. *See J.E.B.*, 114 S. Ct. at 1427 n.11. And even if there is a "measure of truth" in some of the stereotypes used to justify gender classifications, they cannot justify the refusal to admit women to VMI or The Citadel. To deny Nancy Mellette and other women admission to a public college for which they are indisputably qualified, solely because of their gender, perverts the fundamental principle of equal opportunity upon which this Nation rests. *See Adarand*, 115 S.Ct. at 2112.

2. The Assertion that the Admission of Women Will "Change" VMI Is Not Constitutionally Sufficient to Deny Women a Military-Style Education

VMI argues that the admission of women would materially change certain aspects of its program, making it more like the federal service academies. The lower courts agreed, finding that "[e]ven if the female could physically and psychologically undergo the rigors of the life of a male cadet, her introduction into the process would change it." *United States v. Commonwealth of Virginia*, 766 F. Supp. at 1414. The lower courts did *not* find that the changes would nega-

tively affect the ability of male cadets (or female cadets) to learn to become citizen-soldiers. Rather, they advanced the novel, and unsupported, theory that the prospect of *any* change in VMI's program, no matter how trivial, justified maintaining the purity of its admissions policy. *See, e.g., VMI II*, 44 F. 3d at 1440 ("the program would be irrevocably altered, forever denying its unique methodology to both men and women").

The district court found, for example, that "if VMI were to admit women, it would become more similar to the Virginia Polytechnical Institute, so that its uniqueness would be lost." The district court conceded that a coeducated VMI would still be unique, because "[e]ven if this were to occur, VMI would remain the only small college campus in Virginia offering a military program" and that women "would benefit from the availability of VMI." *United States v. Commonwealth of Virginia*, 766 F. Supp. at 1414. Despite that admission, the district court concluded, without any evidence, that the potential benefits to women were outweighed by the resulting changes in VMI's "process." *See id.* It concluded:

> VMI is a different type of institution. It has set its eye on the goal of citizen-soldier and never veered from the path it has chosen to meet that goal. VMI truly marches to the beat of a different drummer, and I will permit it to continue to do so.

Id. at 1415.

If the lower courts are correct that a public institution may exclude qualified applicants that may affect any aspect of its program, this nation's schools would be segregated to this day. The specter of "change" is constitutionally insufficient to deny qualified applicants admission to a public college. Moreover, it is logically inconsistent with the finding in *VMI II* that a college can achieve the same mission or goals under a variety of educational methods. If that is the case, Virginia cannot exclude women simply because VMI may have to put shades

on cadets's windows or locks on doors. The notion that women will "destroy" an institution ignores the reality that all of the federal service academies have admitted women for the past twenty years. This fear of women, which one Citadel expert likened to a "toxic virus," is neither a legitimate, nor important, state objective.

3. Virginia Cannot Deny Women a Unique Military-Style Education Under a Supposed Policy of "Diversity" or "Single-Sex Education"

Virginia's post hoc rationalization that VMI is a "single gender" college is not a true state policy, but an attempt to preserve its all male tradition. The Fourth Circuit found that VMI failed to offer any evidence of the existence of a policy of supporting single-sex education. *VMI I*, 976 F.2d at 898. To the contrary, the Fourth Circuit noted that the only official statement on the issue announced a policy of equal access and educational opportunities for both men and women. *Id.* The existence of such a policy is not consistent with the trend in Virginia toward coeducation. Each of the formerly public single-sex colleges in Virginia became coeducational, with the exception of VMI. The same is true of South Carolina. *See infra* at p. 4.

Even assuming that Virginia in fact had a policy of offering diversity or promoting single-sex education, it would not justify offering men, and not women, the benefits of a military-style education at VMI. A gender classification must do more than benefit members of the favored gender. *Hogan*, 458 U.S. at 731 n.17. As this Court explained, "since any gender-based classification provides one class a benefit or choice not available to the other class, . . . [the] argument begs the question." *Hogan*, 458 U.S. at 731 n. 17. Similarly, "[a] policy of diversity is not advanced by the establishment of an institution for only one gender." *Faulkner*, 10 F.3d at 232; *VMI*, 976 F.2d at 892.

II

VIRGINIA'S DECISION TO CONTINUE THE EXCLUSION OF WOMEN FROM VMI AND SEGREGATING WOMEN IN A SEPARATE AND INTENTIONALLY UNEQUAL PROGRAM COMPOUNDS THE ORIGINAL VIOLATION

A. *The Decisions Below Rest Upon Outmoded Stereotypes and Generalizations About Women That This Court Repeatedly has Rejected*

Rather than remedy the invidious exclusion of women from *VMI* (and The Citadel), *VMI II* compounds the violation by institutionalizing stereotypical and overly broad generalizations about men and women. In approving Virginia's remedial plan of sex-segregation, the Court of Appeals held that there are "acknowledged differences" in the educational "needs" of men and women that render women unsuitable for the rigors and stress of the VMI program. The Court of Appeals also based its exclusion of women on its observation that:

> If we were to place men and women into the adversative relationship inherent in the VMI program, we would destroy, at least for that period of the adversative training, any sense of decency that still permeates the relationship between the sexes.

VMI II, 44 F.3d at 1239.

By branding all women as inappropriate or unfit for the rigors or stress of VMI and The Citadel, the decision below perpetuates prejudices and stereotypes that historically have been used to deny women equal access to employment, education, and the military. Just as this Court found that the Mississippi University for Women's "policy [of excluding males from admission to the School of Nursing] tends to perpetuate the stereotyped view of nursing, as an exclusively

woman's job," *Hogan*, 458 U.S. at 718, so does the exclusion of women from VMI perpetuate the stereotyped view of the military as exclusively a man's job. Segregating women into a separate program which Virginia lawmakers consider "more appropriate" for women robs young women of the choice to pursue a challenging military education. It is for women "to decide in which direction [their] advantage lies," *McKissick v. Carmichael*, 187 F.2d 949, 954 (4th Cir. 1951), *cert. denied*, 341 U.S. 951 (1951).

This genteel notion of a "sense of decency" between the sexes is reminiscent of chivalric, paternalistic rationales for treating women as less than equals. It is a modern day equivalent of the protectionist rationales used, for example, to limit women's employment opportunities (*see Muller v. Oregon*, 208 U.S. 412, 421 (1908) (women who work long hours on their feet suffer "injurious effects, upon the body, and, as healthy mothers are essential to vigorous offspring, their physical well-being becomes an object of public interest and care"); and to exclude women from juries (*see, e.g., Mississippi v. Hall*, 187 So. 2d 861, 863 (Miss. 1966), *appeal dismissed*, 385 U.S. 98 (1966) (women may be excluded from juries in part "to protect them . . . from the filth, obscenity, and noxious atmosphere that so often pervades a courtroom during a jury trial")).

B. The Fourth Circuit Failed to Subject Virginia's Asserted Objective to Heightened Scrutiny as Required Under Hogan

In abandoning the well-established analysis employed by this Court in *Hogan*, the Fourth Circuit contrived its own "special intermediate scrutiny test" which effectively substitutes review under the rational basis test in place of the heightened scrutiny required by this Court. *See VMI II*, 44 F.3d at 1237. The "special" test eliminates the requirement in *Hogan* that a state demonstrate that its asserted governmental objective is sufficiently important to exclude an entire gender from a public college. Instead, the Fourth Circuit held that federal courts should "defer" to a state's recitation of the governmental ob-

jective served by a discriminatory sex-based classification, so long as the purpose "is not pernicious and does not violate traditional notions of the role of government." *VMI II*, 44 F.3d at 1237. The Court of Appeals conceded that "[t]he cautious approach to this first prong of intermediate scrutiny effectively redirects the court's focus on evaluating the state's means for obtaining its objective, which is the second step to the *Hogan* analysis." *Id.* at 1236.

This "deferential" treatment of a state's proffered justification insulates from scrutiny the very kinds of state declarations of purpose that courts are required to scrutinize, a dangerous throwback to the pre-*Reed* v. *Reed*[3] era, when gender classifications were presumed valid. The Court of Appeals failed to inquire whether Virginia's asserted objective in offering single-gender education in fact was the actual purpose of Virginia's remedial proposal, rather than its self-evident desire to perpetuate the all-male tradition of the school. This omission is particularly egregious because, as Judge Phillips points out, the proposal is a "judicially required remedy" for a discriminatory and invidious gender classification. *VMI II*, 44 F.3d at 1248.

Until this litigation, Virginia never sought to provide women with "single-sex" educational opportunities. It has not done so today. Without the millions of dollars donated by alumni committed to preserving VMI's all-male tradition, there would be no state-sponsored parallel program for women.

Taking judicial notice of matters commonly known in Virginia, Judge Phillips concluded that

> the prestige and influence of VMI and its justly loyal alumni and their organization in influencing any political decision affecting VMI's interest is sufficiently powerful to ensure that their overriding purpose in this matter effectively defines the actual governmental objec-

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[3] Reed v. Reed, 404 U.S. 71 (1971).

> tive of the . . . proposed remedial plan. That overriding purpose remains the preservation of VMI as a state-supported educational institution for men only, with all other asserted purposes of the plan merely secondary means to that end.

*Id.*at 1247 n. 5.

The governmental objectives proffered by Virginia to support the continued exclusion of women from VMI "demonstrably are rationalizations compelled by the exigencies of this litigation rather than the actual overriding purpose of the proposed separate-but-equal arrangement." *VMI II*, 44 F.3d at 1247. As Judge Phillips concluded

> the primary, overriding purpose is not to create a new type of educational opportunity for women, nor to broaden the Commonwealth's educational base for producing a special kind of citizen-soldier leadership, nor to further diversify the Commonwealth's higher education system . . . but is simply by this means to allow VMI to continue to exclude women in order to preserve its historic character and mission as that is perceived and has been primarily defined in this litigation by VMI and directly affiliated parties.

Id.

In addition, the Fourth Circuit failed to find that offering "single-sex" education is sufficiently legitimate and important to justify the permanent exclusion of women from a prestigious public college. Unlike the rational basis test, heightened scrutiny requires that a state demonstrate that its proffered objective is sufficiently important to justify preferential treatment of one gender. Most recently, this Court in *J.E.B.* held that even the right to an impartial jury was not a

sufficiently important interest to justify gender-based peremptory challenges. *See also Hogan*, 458 U.S. 718 (1982); *Frontiero*, 411 U.S. 677 (1974) (administrative convenience did not justify classification that awarded servicemen, and not women, spousal benefits without showing of dependency).

In light of *J.E.B*, the possibility that single-sex education may benefit some students is plainly insufficient to justify excluding women from VMI because of the supposed "educational needs" of "most" women. Not only is the purported interest in providing a particular type of education far less compelling than the constitutionally protected right to a fair trial, the Fourth Circuit acknowledged that there is disagreement among professionals over the supposed value of single-sex colleges. *VMI II*, 44 F.3d at 1230. In fact, there is no credible evidence that single-sex education for men is more beneficial than coeducation. For example, the Fourth Circuit in *VMI I* relied on findings by Alexander Astin, who did *not* testify at the trial, in his 1977 book, *Four Critical Years*, as to the value of single-sex education. *VMI I*, 976 F.2d at 897. Dr. Astin has now testified on behalf of the United States and Ms. Faulkner in *VMI* and *Faulkner*. His more recent research demonstrates that the single-sex admission policies of the colleges he studied in the late 1960s (when women were barred from Ivy League colleges) did *not* cause the effects he observed in his first study: the positive benefits remained *even after the schools became coeducational*.[4]

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[4] The Fourth Circuit also relied upon Carol Gilligan's book, *In a Different Voice*, in discussing the finding of the district court. Like Dr. Astin, Dr. Gilligan did not testify at trial in VMI, but has appeared as a witness on behalf of Ms. Faulkner to testify that males-only colleges like The Citadel are harmful to men. She has filed an amicus brief on behalf of the United States in this proceeding.

C. *Virginia Cannot Remedy the Invidious Exclusion of Women from VMI by Creating a Separate and Intentionally Unequal Program That Lacks the Prestige, Tradition, or Reputation Offered at VMI*

Virginia cannot justify excluding women from VMI by claiming that it offers a "substantively comparable" education at another college. This Court in *Hogan* held that the exclusion of men from Mississippi University for Women's all-female nursing program was unconstitutional even though Mississippi offered men comparable nursing programs nearby. *Hogan*, 458 U.S. at 718. The classification under attack is the males-only admission policy of VMI. Whether or not Virginia offers women opportunities for a college education elsewhere is just as irrelevant as whether the male plaintiff in *Hogan* could attend another public nursing program.[5]

Even under the "separate but equal" rule of *Plessy v. Ferguson*, "a basic prerequisite was that [the separate programs] be truly, *substantially* equal in all the relevant criteria, tangible and intangible, by which educational institutions are evaluated." *VMI II*, 44 F.3d at 1249 (Phillips, J., dissenting). This Court repeatedly held that a separate and newly created educational program cannot duplicate the prestige, history or access to powerful alumni or professional networks of a well-established school. *Sweatt v. Painter*, 339 U.S. 629 (1954); *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950). The principles of equal protection announced in *Sweatt* and *McLaurin* apply equally to segregation based on sex. *See VMI*, 52 F.3d at 93 (Motz, J. dissenting); *Faulkner II*, 51 F.3d at 450 (Hall, J. concurring); *VMI II*, 44 F.3d at 1249 (Phillips, J. dissenting).

As the Virginia district court held in *VMI*, "if separate but equal is the standard by which the [remedial] plan must be measured, then it surely must fail." *United States v. Common-*

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[5] This Court has rejected a similar "bottom line" defense under Title VII that discrimination against women in a particular program can be justified by proving that the system as a whole treats women "fairly." *Connecticut v. Teal*, 457 U.S. 440 (1982).

wealth of Virginia, 852 F. Supp. 471, 475 (1994), *aff'd*, *VMI II*, 44 F.3d 1229 (4th Cir. 1995). The lower courts concede that VWIL does not offer the "historical benefit and prestige" afforded men at VMI. *VMI II*, 44 F.3d at 1241. "[T]he contrast between [the proposed VWIL program and VMI] on all the relevant tangible and intangible criteria is so palpable as not to require detailed recitation." *Id.* at 1250. Even assuming that the VWIL proposal is able to realize its goals, "it will necessarily be a pale shadow of VMI in terms of the great bulk, if not all of those criteria." *Id.*

> The student and eventual graduate of VWIL will not be able to call on the prestigious name of "VMI" in seeking employment or preference in her various endeavors; the powerful political and economic ties of the VMI alumni network cannot be expected to open for her; the prestige and tradition of her own fledgling institution cannot possibly ever achieve even rough parity with those of VMI.

Id. Judge Phillips concluded that "[i]t is difficult to believe that one who had a free choice between [these] schools would consider the question close." *Id.*

D. The Only Constitutional Remedy is to Admit Qualified Women to VMI

Once a federal court finds that a state has unlawfully excluded a group of students from a public educational program, the only appropriate remedy is for the state to admit the excluded individuals and to remedy the effects of the prior discrimination. *See, e.g., Brown I*, 347 U.S. at 493; *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969); *Florida ex rel. Hawkins v. Board of Control*, 350 U.S. 413 (1956) (ordering the immediate admission of a black student into the University of Florida Law School, the only law school in the state); *Sipuel v. Board of Regents*, 332 U.S. 631 (1948) (upholding immediate admission of a black student to the only public law school in Oklahoma).

Having decided to provide a military-style education at VMI, Virginia must offer that opportunity to men and women on equal terms. Women are entitled to the opportunity for an education that is equal to that offered men at VMI, not a "substantively comparable" program that lacks the historical benefit and prestige of a degree from a venerable institution established over 150 years ago. *See Faulkner II*, 51 F.3d 450-51 (Hall, J., concurring); *VMI II*, 52 F.3d at 93 (Motz, J., dissenting).

III

THIS CASE OFFERS THE COURT AN OPPORTUNITY TO ANSWER THE UNRESOLVED QUESTION OF WHETHER STRICT SCRUTINY APPLIES TO GENDER CLASSIFICATIONS

Virginia's decision to "remedy" the unlawful exclusion of women from VMI by creating a separate and deliberately unequal program at a private women's college, funded almost entirely by VMI alumni, should be considered inherently suspect. Virginia's proposal is based solely upon generalizations and stereotypes about women that would be rejected out of hand if applied to racial or ethnic minorities. It reinvokes a history of exclusion of women from public education and denies women access to a prestigious public educational program based solely upon an inherited identifying trait over which they have no control, rather than on the basis of her individual ability and accomplishments. It is apparent that Virginia's attempt to create a separate and plainly unequal program, rather than admit women to VMI, is not substantially related to any important state interest and thus cannot survive even so-called intermediate scrutiny. It is equally apparent, however, that the intermediate scrutiny test has been unevenly applied by the lower courts and, as this case demonstrates, has often failed to protect the equal rights of women. For all of these reasons, Virginia should be required to prove that the continued exclusion of women from VMI is narrowly tailored to meet a compelling governmental interest.

On several recent occasions this Court explicitly has reserved the issue of whether strict scrutiny applies to gender classifications. *J.E.B.*, 114 S. Ct. at 1425 n.6 ("once again [the Court] need not decide whether classifications based on gender are inherently suspect"); *Harris v. Forklift Sys. Inc.*, 114 S. Ct. 367, 373 (1993); *Hogan*, 458 U.S. at 724 n.9; *Stanton v. Stanton*, 421 U.S. 7, 13 (1975). In *J.E.B.*, this Court reaffirmed without qualification "what, by now, should be axiomatic: Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause." *J.E.B.*, 114 S. Ct. at 1422. This Court's decisions under the Fourteenth Amendment "reveal[s] a strong presumption that gender classifications are invalid." *J.E.B.*, 114 S. Ct. at 1433 (Kennedy, J., concurring). That is so because gender is not usually relevant to any legislative classifications. *See Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Frontiero v. Richardson*, 411 U.S. 677, 687-88 (1973). State policies that exclude women, like those that exclude racial minorities, historically have been rooted in prejudicial attitudes about the relative abilities and roles of men and women. *J.E.B.*, 114 S. Ct. at 1422.

Citing the plurality opinion in *Frontiero*, which applied strict scrutiny in reviewing a gender classification, this Court summarized the "long and unfortunate history of sex discrimination" that pervades this nation's history:

> [T]hroughout much of the 19th century *the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes.* Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children . . . . And although blacks were guaranteed the right to vote in 1870, women were denied even that right — which is itself 'preservative of other basic civil and political rights' — until adop-

> tion of the Nineteenth Amendment half a century later.

J.E.B., 114 S. Ct. at 1425 (citing *Frontiero*, 411 U.S. at 685 (emphasis added)); *see also Mathews v. Lucas*, 427 U.S. 495 (1976) (historic legal and political discrimination based upon sex, like discrimination based on race, has been severe and pervasive).

Clarifying the appropriate standard of review would provide essential guidance to lower courts as to application of intermediate scrutiny. In *J.E.B*, Justice Kennedy noted that "the intermediate scrutiny test" does not "provide a very clear standard in all instances." *J.E.B.*, 114 S. Ct. at 1433-34 (Kennedy, J., concurring). Similarly, Justice Stevens observed in *City of Cleburne v. Cleburne Living Center*, "our cases have not delineated three — or even one or two — such well-defined standards." 473 U.S. 432, 451 (1985) (Stevens, J., concurring). The lower courts repeatedly have complained that the standard provides little guidance. *See, e.g., Lamprecht v. FCC*, 958 F.2d 382, 398 n.9 (D.C. Cir. 1992) (referring to intermediate scrutiny as indeterminate); *Coral Constr. Co. v. King County*, 941 F.2d 910, 931 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992) ("We are cognizant of the problems with intermediate scrutiny"); *Contractors Ass'n of Eastern Pa. v. City of Philadelphia*, 734 F. Supp. 1274, 1303 (E.D. Pa. 1990). Prior decisions have not required the resolution of this issue because most sex-based classifications have failed to meet even a more permissive standard. *See, e.g., J.E.B.*, 114 S. Ct at 1425 n.6. This case, likewise, can be resolved within the framework established by *Hogan* and *J.E.B.*, but Ms. Mellette respectfully submits that jurisprudential and practical considerations militate in favor of clarifying that classifications based on sex, like those based on race and ethnicity, require strict scrutiny.

VMI II and *Faulkner II* exemplify the serious confusion surrounding application of the appropriate level of review. In upholding a "separate and unequal" program for women, the Court of Appeals in *VMI II* held that different facilities for men and women could be justified upon generalized "dif-

ferences" between men and women as a group, even if individual women like Nancy Mellette can meet all of the qualifications of VMI or The Citadel. The Court of Appeals ignored the holdings of this Court in *J.E.B. and Hogan* rejecting classifications based upon generalizations about men and women as groups. Instead of treating such generalizations as suspect, it held that "intermediate scrutiny" presumes, as a starting point, that there are acknowledged differences between women and men, not just in their roles in human reproduction, but in their psychology, temperament and emotional characteristics. Intermediate scrutiny was designed to *eliminate* such assumptions, not validate them. *Craig v. Boren*, 429 U.S. 190, 198-99 (1976); *J.E.B.*, 114 S. Ct. at 1425; *see also Cleburne*, 473 U.S. at 440.

In addition, legal scholars have noted the confusion that has arisen among lower courts as to which standard of scrutiny to apply to gender-based affirmative action programs after this Court's decision in *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (establishing strict scrutiny as standard of review for race-based affirmative action plans). *See, e.g.*, S. Oliver, Jr., *A Survey of Post-Croson Developments*, 38 Loyola L. Rev. 7, 36 (1992); T. Aleinkoff, A *Case For Race-Consciousness*, 91 Colum. L. Rev. 1060, 1095 n.168 (1991). One irrational result has been that, in some federal courts, some remedial measures for sex discrimination have been judged under strict scrutiny, while others have been judged under intermediate scrutiny. *Compare, e.g., Conlin v. Blanchard*, 890 F.2d 811 (6th Cir. 1989), *aff'd*, 947 F.2d 944 (6th Cir. 1991) (per curiam) (applying strict scrutiny to invalidate program), *with, Coral Constr. Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), *cert. denied*, 502 U.S. 1033 (1992) (applying intermediate scrutiny to uphold program). This pattern of inconsistency is not likely to abate given this Court's recent decision in *Adarand*, subjecting race-based affirmative action programs to strict scrutiny.

Although women have won significant legal gains since the early 1970s, the need still exists for a consistent nationwide application of principles of women's equality before the

law. It is still true that "in part because of the high visibility of the sex characteristic, women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena." *Frontiero*, 411 U.S. at 686. Once a court finds that a state has invidiously discriminated against women, its decision to perpetuate the exclusion of women should be subject to strict scrutiny to ensure that the remedial choice is necessary to fulfill a compelling state interest.

CONCLUSION

For the reasons stated above, this court should declare that the exclusion of women from VMI violates the right to equal protection under the Fourteenth Amendment and order the immediate admission of women into VMI.

Dated: New York, New York
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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICI CURIAE*	1
INTRODUCTION	2
ARGUMENT	5
I. VMI'S EXCLUSION OF WOMEN VIOLATES THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION	5
A. VMI Does Not Have a Legitimate and Important Interest That Justifies Its Exclusion of Women	6
1. The Fourth Circuit's Deference to VMI's *Post Hoc* Justifications for Excluding Women Was Unwarranted, and This Court Should View These Justifications with Suspicion	6
2. VMI's Purported Interest in "Single-Sex Education" Is Impermissible Because It Circumvents Scrutiny and Encompasses Gender Stereotypes	8
3. This Court Should Reject VMI's Purported Interest in "Citizen-Soldiers"	9
B. Even if VMI's Interests Were Legitimate and Important, Its Exclusion of Women Is Not Substantially Related to Furthering Those Interests	9
II. THE PROPOSED VWIL PROGRAM WOULD NOT OFFER WOMEN A VMI EDUCATION AND IS NOT A SUFFICIENT REMEDY FOR THE STATE'S VIOLATION OF EQUAL PROTECTION	13

TABLE OF CONTENTS—Continued

Page

III. THE CONTEMPLATED TWO-SCHOOL SYSTEM, CONSISTING OF VMI AND THE PROPOSED VWIL, CANNOT SURVIVE INTERMEDIATE SCRUTINY 15

A. The Commonwealth Has Not Shown That the Maintenance of an All-Male VMI and the Creation of an All-Female VWIL Is Substantially Related to Important State Interests 15

B. The Contemplated Two-School System Would Not Even Offer Substantively Comparable Benefits to Men and to Women 18

IV. THE COURT SHOULD TAKE THIS OPPORTUNITY TO ADOPT THE STRICT SCRUTINY STANDARD FOR HARMFUL GENDER-BASED CLASSIFICATIONS WHICH SEEK TO EXCLUDE OR STIGMATIZE 21

A. The Appropriate Standard of Review Remains an Open Question 21

B. Women Face Historic and Current Pernicious Discrimination 22

C. This Court as Well as State Courts Have Increasingly Recognized the Need for a More Exacting Standard to Judge Gender-Based Discrimination 24

V. CLASSIFICATIONS WHICH SEEK TO ASSIST MEMBERS OF ONE SEX WHO ARE DISPROPORTIONATELY BURDENED ARE NOT INVIDIOUS, AND DO NOT MERIT THE HIGHEST LEVEL OF REVIEW 25

A. Relevant, Compensatory Classifications Are Within the Original Intended Purpose of the Fourteenth Amendment 25

B. Programs That Seek to Assist Members of a Group in Overcoming Unique Burdens Need Not Be Subject to Strict Scrutiny 27

CONCLUSION 30

TABLE OF AUTHORITIES

CASES — Page

Adarand Constructors, Inc. v. Pena, —— U.S. ——, 115 S. Ct. 2097 (1995) 4, 25, 29
Bradwell v. Illinois, 83 U.S. 442, 16 Wall. 130 (1873) 9, 12, 22
Brown v. Bd. of Educ., 347 U.S. 483 (1954) 19, 26
Califano v. Goldfarb, 430 U.S. 199 (1977) 7
Califano v. Webster, 430 U.S. 313 (1977) 29
City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) 29
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) ..... *passim*
Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) 7
Craig v. Boren, 429 U.S. 190 (1976) 5, 24
Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975) 24
Edelman v. Jordan, 415 U.S. 651 (1974) 18
Frontiero v. Richardson, 411 U.S. 677 (1973) ..... *passim*
Fullilove v. Klutznick, 448 U.S. 448 (1980) 27
Goesaert v. Cleary, 335 U.S. 464 (1948) 17, 22
Harris v. Forklift Systems, —— U.S. ——, 114 S. Ct. 367 (1993) 21
Hewitt v. State Accident Ins. Fund, 294 Or. 33, 653 P.2d 970 (1982) 24
Hills v. Gautreaux, 425 U.S. 284 (1976) 13
Hoyt v. Florida, 368 U.S. 57 (1961) 17
Illinois v. Ellis, 57 Ill. 2d 127, 311 N.E. 2d 98 (1974) 24
In the Interest of McLean, 30 Tex. Sup. J. 206, 725 S.W.2d 696 (1987) 24
J.E.B. v. Alabama ex rel. T.B., —— U.S. ——, 114 S. Ct. 1419 (1994) ..... *passim*
Kahn v. Shevin, 416 U.S. 351 (1974) 29
Kirchberg v. Feenstra, 450 U.S. 455 (1981) 7
Korematsu v. United States, 323 U.S. 214 (1944) 26
LeClair v. LeClair, 137 N.H. 213, 624 A.2d 1350 (1993) 24
Louisiana v. United States, 380 U.S. 145 (1965) 13
Loving v. Virginia, 388 U.S. 1 (1967) 11, 26

TABLE OF AUTHORITIES—Continued

	Page
Lowell v. Kowalski, 380 Mass. 663, 405 N.E. 2d 135 (1980)	24
In Re Marriage of Flaherty, 31 Cal.3d 637, 646 P.2d 179 (1982)	24
McLaughlin v. Florida, 379 U.S. 184 (1964)	26, 27
Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982)	*passim*
Muller v. Oregon, 208 U.S. 412 (1908)	22
Orr v. Orr, 440 U.S. 268 (1979)	10, 13
Page v. Welfare Comm., 170 Conn. 258 A.2d 1118 (1976)	24
People v. Salinas, 191 Colo. 171, 551 P.2d 703 (1976)	24
Radice v. New York, 264 U.S. 292 (1924)	17
Rand v. Rand, 280 Md. 508, 374 A.2d 900 (1977)	24
Reed v. Reed, 404 U.S. 71 (1971)	5, 18, 22, 24
Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978)	26, 27, 28
Sail'er Inn v. Kirby, 5 Cal.3d 1, 485 P.2d 529 (1971)	24
Stanton v. Stanton, 421 U.S. 7 (1975)	22
Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971)	13
Sweatt v. Painter, 339 U.S. 629 (1950)	19
United States v. Virginia, 766 F. Supp. 1407 (W.D. Va. 1991)	*passim*
United States v. Virginia, 976 F.2d 890 (4th Cir. 1992) (*VMI I*)	*passim*
United States v. Virginia, 852 F. Supp. 471 (W.D. Va. 1994)	*passim*
United States v. Virginia, 44 F.3d 1229 (4th Cir. 1995) (*VMI II*)	*passim*
United States v. Virginia, 52 F.3d 90 (4th Cir. 1995)	12
Vorchheimer v. Sch. Dist. of Phila., 532 F.2d 880 (3rd Cir. 1976), *aff'd*, 430 U.S. 703 (1977)	18, 19
West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)	17
Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970), *aff'd*, 401 U.S. 951 (1971)	17

TABLE OF AUTHORITIES—Continued

Page

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 28

CONSTITUTION AND STATUTES

U.S. CONST. amend. V 5
U.S. CONST. amend. XIV 5
U.S. CONST. art. VI, cl. 2 28
Ch. 103, 12 Stat. 796 (1863) 26
Ch. 127, 14 Stat. 66 (1866) 26

OTHER SOURCES

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, HOW SCHOOLS SHORTCHANGE GIRLS 28-30 (1982) 16, 28

International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (adopted by the United States Sept. 8, 1992), art. 1, § 4 28

International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (adopted by the United States Sept. 8, 1992), arts 2(2), 8, 26 28

Brief of the NAACP Legal Defense and Educational Fund, Inc., as *Amicus Curiae*, *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978) (No. 76-811, Oct. Term 1976) 26

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NCAA GENDER-EQUITY STUDY: SUMMARY OF RESULTS (1992) 16, 28

MYRA SADKER AND DAVID SAKER, FAILING AT FAIRNESS: HOW AMERICA'S SCHOOLS CHEAT GIRLS (1994) 16, 27

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INTEREST OF THE *AMICI CURIAE*

As organizations and individuals concerned with securing full equality of opportunity in education, employment, and contracting, *amici* have a strong interest in this case, and therefore respectfully submit this brief. A full recitation of their interests in this case is contained in the Appendix hereto.

The written consents of the parties to the submission of this brief have been lodged with the Clerk pursuant to Rule 37.2.

INTRODUCTION

Since its establishment by the Commonwealth of Virginia in 1839, the Virginia Military Institute (VMI) has excluded women from admission to its unique, adversative training program. VMI's mission is to graduate "citizen-soldiers" who will provide leadership in civilian life and the military. Focusing on character development and leadership training, VMI's educational program stresses physical and mental rigor, equality of treatment, lack of personal privacy and cultural indoctrination. After more than a century of women being denied the right to a VMI-type education, the United States challenged VMI's male-only admissions policy under the Equal Protection Clause of the Fourteenth Amendment.

In an apparent contradiction of terms, the district court held that VMI's male-only admission policy was substantially related to the important state interest of promoting "diversity" of education through a single-sex education program. *United States v. Virginia*, 766 F. Supp. 1407 (W.D. Va. 1991). Although the Court of Appeals for the Fourth Circuit expressed concern that women be offered the unique benefits of a VMI-type of education, it upheld VMI's single-sex program. In so doing, the court ordered the State to "formulate, adopt, and implement a plan that conforms with the Equal Protection Clause of the Fourteenth Amendment." *United States v. Virginia*, 976 F.2d 890, 900 (4th Cir. 1992) (*VMI I*). The court remanded the case for further proceedings to determine whether there were constitutional alternatives for providing women with a similar education short of actually admitting women to VMI.

To comply with the court's order, the State proposed an alternative program—the Virginia Women's Institute for Leadership (VWIL)—designed specifically to address the

"different educational needs of women" in the quest to produce female citizen-soldiers. The proposed VWIL program is but a mere shadow of the full educational experience offered at VMI. Glaringly absent from the VWIL proposal is VMI's unique military model, including its critical adversative method. This is not the only difference between these two programs. While the VMI curriculum focuses on math and sciences, VWIL would not offer a Bachelor of Science degree. Engineering degrees would only be conferred if VWIL students entered a joint program and attended a private Missouri university for two years.

Physical rigor, deemed an essential component of the VMI educational experience, would be all but lost at VWIL where the athletic and training facilities are substantially less sophisticated and extensive. In addition to these programmatic disparities, VWIL could not match the prestige associated with a VMI degree. VWIL simply would not enjoy the 150-year history and tradition associated with VMI, and its graduates cannot expect to have equivalent support from the powerful VMI alumni network. Despite all of this, the district court approved the VWIL plan. *United States v. Virginia,* 852 F.Supp. 471 (W.D. Va. 1994).

Three years later the Fourth Circuit affirmed the state's VWIL proposal, applying an unprecedented "special intermediate scrutiny" test. *United States v. Virginia,* 44 F.3d 1229 (4th Cir. 1995) (*VMI II*). The court deferred to the "state's election of educational techniques [because] the purpose of providing single-gender education is *not pernicious* and falls within the range of the traditional governmental objective of providing citizens higher education." *Id.* at 1239 (emphasis supplied). Relying heavily on arcane notions about the relative capabilities of women and men, the court justified an all-male VMI by endorsing the dissimilar "female" version: VWIL.

In evaluating the VWIL program, the court departed from the two-prong intermediate scrutiny standard as

recently articulated in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). Ignoring significant disparities between the programs, the court focused on whether men and women would have "opportunities to obtain substantively comparable benefits." Finding no pernicious motive for the sex-based exclusion and concluding that VMI and VWIL would be comparable despite vast differences, the court approved the VWIL proposal. This intermediate scrutiny analysis finds no basis in this Court's precedents and should be expressly disapproved. Consequently, this Court may overturn these decisions under a correctly applied intermediate scrutiny analysis.

Amici also urge this Court to adopt strict scrutiny for invidious gender-based discrimination such as VMI's exclusion of women. Should the Court apply strict scrutiny in this case, it should reconsider the implications of applying strict scrutiny to remedial and non-invidious programs that are designed to assist members of particular groups in overcoming burdens disproportionately faced. Adoption of the strict scrutiny standard for invidious, intentional, gender-based discrimination—although a monumental step forward in the quest for women's rights—may harm women who currently benefit from existing affirmative action and other gender-based remedial programs if such programs are also subject to the demanding strict scrutiny test.

This Court's decisions in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) and *Adarand Constructors, Inc. v. Pena*, —— U.S. ——, 115 S. Ct. 2097 (1995) establish a standard requiring "consistency" in evaluating both "invidious" and "benign" classifications. This requirement undermines the remedial purpose of programs that seek to rectify intentional, invidious discrimination. A truly consistent approach would consider the nature of the classification—benign or invidious—and tailor the level of scrutiny to its underlying purpose. The Fourteenth Amendment contemplates the use of such classifications, even if they favor members of one sex or

race, to combat discrimination. "[E]ven if we completely disregard our history of racial injustice, race is not always irrelevant to sound governmental decisionmaking." *Croson*, 488 U.S. at 512 (Stevens, J., concurring in part and concurring in the judgment).

This nation's painful history of discrimination continues to this day. Remedial classifications that promote inclusion do not suffer from the invidious character of classifications that stigmatize and harm, and need not be subject to the highest scrutiny. This Court should seize the opportunity to finally acknowledge that gender-based discrimination deserves strict scrutiny, and to strike down the "consistent" application of the strict scrutiny standard to both invidious and remedial classifications.

ARGUMENT

I. VMI'S EXCLUSION OF WOMEN VIOLATES THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION.

The United States Constitution guarantees all persons equal protection under the law. U.S. CONST. amends. V, XIV. For more than twenty-five years, this Court has applied a heightened level of scrutiny to classifications based on gender. *Reed v. Reed*, 404 U.S. 71 (1971). This two-prong standard requires that classifications based on gender: (1) be supported by legitimate and important state interests; and (2) be substantially related to those interests. *Craig v. Boren*, 429 U.S. 190, 197 (1976). This Court has demanded an "exceedingly persuasive justification" for sex-based classifications, and has rejected those that reflect outdated stereotypes of women's roles and abilities. *Hogan*, 458 U.S. at 724 (1982); *J.E.B. v. Alabama ex rel. T.B.*, ——U.S. ——, 114 S. Ct. 1419 (1994).

The case now before this Court threatens to destroy a quarter-century of progress for women. The Fourth Cir-

cuit's opinions in *VMI I* and *VMI II* constitute a radical departure from the intermediate scrutiny standard.

A. VMI Does Not Have a Legitimate and Important Interest That Justifies Its Exclusion of Women.

VMI must demonstrate an "exceedingly persuasive justification" for its discriminatory policy. *Hogan*, 458 U.S. at 724. The Fourth Circuit failed to address this prong of the intermediate scrutiny standard. *See VMI II*, 44 F.3d at 1237. Had it done so, that court would have discovered that VMI's proferred interests are suspect and contain stereotypical assumptions prohibited by the Equal Protection Clause.

1. *The Fourth Circuit's Deference to VMI's* Post Hoc *Justifications for Exluding Women Was Unwarranted, and This Court Should View These Justifications with Suspicion.*

As Judge Phillips noted in his dissent below, finding a state interest to support the exclusion of women from VMI presents "a real problem of identification in this case." *VMI II*, 44 F.3d at 1246. When VMI opened its doors more than 150 years ago, it did not contemplate alternatives to a male-only admissions policy, but simply incorporated implicit assumptions regarding men and women that were prevalent at the time. Not only were women denied full participation in political or civil life, but they were excluded from the military realm altogether. Relegated to home and hearth, nineteenth-century women could not vote, "hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children." *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973).

Thus, the only interests articulated to justify VMI's exclusion of women are necessarily after-the-fact "rationalizations, compelled by the exigencies of this litigation rather than the actual purpose" of VMI. *VMI II*, 44 F.3d at 1247 (Phillips, J., dissenting). This Court has viewed

such justifications with skepticism. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 653 (1974) (Powell, J., concurring in result); *Frontiero*, 411 U.S. 677 (1973). In such circumstances, the Equal Protection Clause requires that these interests be subject to rigorous examination to determine whether they reflect "archaic and stereotypic notions." *Hogan*, 458 U.S. at 725. Moreover, the convoluted history of the interests offered to justify excluding women from VMI warrants close scrutiny by this Court.[1]

Here, however, the Fourth Circuit inappropriately allowed VMI's articulation of interests to enjoy significant deference "so long as the purpose [was] not pernicious and [did] not violate traditional notions of the role of government . . ." *VMI II*, 44 F.3d at 1237. Deference is not appropriate here, *see Califano v. Goldfarb*, 430 U.S. 199, 210-11 (1977), and undermines the integrity of the heightened scrutiny standard normally applied to gender classifications. Moreover, the purported interests here are not the reasoned deliberations of an elected democratic body to which deference may be appropriate. *Id.* at 212. It is the policy of the VMI Board of Visitors, and not the Commonwealth of Virginia, that keeps VMI an all-male institution. *United States v. Virginia*, 766 F. Supp. at 1412, 1419. The Commonwealth's initial failure to defend the classification renders the legitimacy and importance of any state interest all the more dubious.[2] *See Kirchberg v. Feenstra*, 450 U.S. 455, 460 n.7 (1981).

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[1] Interests proffered include the goal of "diversity in education" through maintaining VMI's all-male status and "distinctive educational method," *United States v. Virginia*, 766 F. Supp. at 1411; VMI's mission of producing "citizen-soldiers, educated and honorable men who are suited for leadership in civilian life," *VMI I*, 976 F.2d at 898; and the "objective of providing single-gender education" adapted differently for men and women, *VMI II*, 44 F.3d at 1237.

[2] The VMI Foundation, the VMI Alumni Association, and private organizations associated with VMI all intervened after the Commonwealth of Virginia declined to defend this suit. *United States v. Virginia*, 766 F. Supp. at 1408.

2. *VMI's Purported Interest in "Single-Sex Education" is Impermissible Because It Circumvents Scrutiny and Encompasses Gender Stereotypes.*

VMI claims a legitimate and important interest in single-sex education simply for the sake of single-sex education. *VMI II*, 44 F.3d at 1237-39. Asserting that single-sex institutions are "pedagogically justifiable" without more does not prove they are constitutional. *See Hogan*, 458 U.S. at 731. In accepting this justification, the Fourth Circuit bypassed the rigorous two-part analysis required.[3] VMI must demonstrate that the classification is substantially related to furthering some separate goal, not simply offer the circular justification that "[VMI's] single-sex status would be lost . . . if it were to admit women." *See United States v. Virginia*, 766 F. Supp. at 1413.

VMI's fluctuating explanation for maintaining an all-male institution belies its true purpose. In *VMI I*, it was not the "maleness" of VMI that precluded admitting women, but the purported need for homogeneity of gender. 976 F.2d at 897. Faced with a court order requiring remedy, however, VMI now claims that its program is suitable only for men. According to testimony offered by the State, "[w]hat women need is a system that builds their sense of self-efficacy," not VMI's rigorous methodology designed for men and their "inflated sense of self-efficacy." *VMI II*, 44 F.3d at 1234.

The Fourth Circuit embraced these stereotypical assumptions. According to the court, the sex-segregated system offered by the State will build women's "sense of self-efficacy through meeting challenges, developing self-discipline, meeting rigor and dealing with it, and having successes." *VMI II*, 44 F.3d at 1234 (internal quotation omitted). Acknowledging that "there remains some disagreement among the experts," the court relies on "com-

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[3] The court below admits as much: "[O]nce the state's objective is found to be an important one, the classification by gender is by definition necessary for accomplishing the objective and might thereby bypass any equal protection scrutiny." *VMI II*, 44 F.3d at 1237.

mon experience" to find that single-sex institutions have intrinsic value because "the focus is properly on matters other than relationships between the sexes." *Id.* at 1238-39. VMI's purported interest is nothing more than an assertion that women are unqualified and unable to succeed in the rigorous, adversative program at VMI.

"[I]f a statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate." *Hogan*, 458 U.S. at 725. Here, the justification both for excluding women from VMI and for remedying that constitutional violation signifies that women are unable to meet challenges or have success at VMI, and must be protected from their inevitable failure. Just as women were once "protected" from the rigors of the practice of law, *Bradwell v. Illinois*, 83 U.S. 442, 16 Wall. 130 (1873), VMI's admissions policy seeks to "protect" women from the rigors of a military education. Laws that perpetuate these arcane characterizations of women's abilities have long since been rejected by this Court. *See Hogan*, 458 U.S. at 725 n.10.

3. *This Court Should Reject VMI's Purported Interest in "Citizen-Soldiers."*

In the end, VMI is left only with the objective expressed in the VMI mission statement: to produce "citizen-soldiers, educated and honorable men . . . who are suited for leadership in civilian life and who can provide military leadership when necessary." *VMI I*, 976 F.2d at 893. It appears, however, that an invidious motive—discrimination against women—drives the continuing male-only admissions policy. *See VMI II*, 44 F.3d at 1247 (Phillips, J., dissenting).

B. Even if VMI's Interests Were Legitimate and Important, Its Exclusion of Women Is Not Substantially Related to Furthering Those Interests.

Even if VMI's objective of producing "citizen-soldiers" were legitimate and important, excluding women must be substantially and directly related to the achievement of

that goal to withstand constitutional scrutiny. *Hogan*, 458 U.S. at 730. A close relationship between the objective and the classification "assures that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." *Id.* at 725-26. Where the state's purpose is "as well served by a gender-neutral classification as one that gender classifies and therefore carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex . . . [T]his is doubly so where the [classification] benefit[s] . . . those without need for special solicitude." *Orr v. Orr*, 440 U.S. 268, 283 (1979).

VMI's exclusion of women is not substantially and directly related to its interest in "citizen-soldiers." The Fourth Circuit speculated that admitting women would "destroy aspects of VMI's program which lie near the core of its holistic system and . . . deny [women] the very benefit they sought by their admission" because the program's adversity, physical training and lack of privacy might change. *VMI II*, 44 F.3d at 1233. The court failed to examine the connection between the purported interest and the exclusion of women, focusing instead upon the relationship between VMI's existing program and its exclusive policy. It is the relationship between the classification and producing citizen-soldiers, however, that is at issue here. The program itself is merely a means to this end. VMI does not have an important interest in continuing its educational program exactly as it is.[4]

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[4] Although VMI's educational program may rest on a male-only tradition, "[m]any of our people's traditions, . . . such as *de jure* segregation and the total exclusion of women from juries, are now unconstitutional even though they once co-existed with the Equal Protection Clause." *J.E.B.*, —— U.S. ——, 114 S. Ct. at 1429 n.15 (internal quotation omitted). VMI cannot now maintain that it has an important interest in continuing its historical discrimination.

Careful analysis of the relationship between VMI's exclusion of women and its purported objective of citizen-soldiers demonstrates that VMI's justifications rest on arcane characterizations of women. VMI's contention that admitting women would require lower physical standards is nothing more than an overbroad generalization that women are the weaker sex. *See Hogan*, 458 U.S. at 725 (generalizations that members of one gender are innately inferior are illegitimate). "[E]ven if a measure of truth can be found in some . . . gender stereotypes . . ., that fact alone cannot support discrimination on the basis of gender . . ." *J.E.B.*, —— U.S. ——, 114 S. Ct. at 1427 n.11. VMI does not, nor can it dispute that some women would be able to meet the existing physical requirements. *United States v. Virginia*, 766 F. Supp. at 1438. The exclusion of women cannot be justified simply because some women cannot meet VMI's physical standards: some men cannot meet these standards either. That some women may fit the overbroad characterization VMI supplies does not change the fact that VMI excludes women willing and able to complete its program.

Moreover, VMI has failed to demonstrate that its uniform and exceedingly high physical training standards are necessary to produce citizen-soldiers. Other physical training programs have graduated men and women who have achieved the highest military and political positions. *See United States v. Virginia*, 766 F. Supp. at 1428 (describing West Point training program). VMI's insistence that women would undermine its physical training program is simply an attempt to retain its exclusionary tradition.[5]

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[5] VMI contends that the inevitable dual physical standards for men and women would cause "jealousy and resentment" among the ranks. *VMI I*, 976 F.2d at 896; *United States v. Virginia*, 766 F. Supp. at 1440. Presumably any integration of an all-male institution that wishes to remain exclusive would cause resentment. This Court should not condone the anticipated discriminatory reactions of cadets. *Cf. Loving v. Virginia*, 388 U.S. 1 (1967).

VMI's contention that the adversative nature of its program would have to change is similarly unconvincing. It is conceded that "the VMI methodology could be used to educate women" and that "some women . . . may prefer the VMI methodology." *United States v. Virginia*, 852 F. Supp. at 481. *See also United States v. Virginia*, 766 F. Supp. at 1436 (between 1988 and 1990, VMI received inquiries from 347 women). The Fourth Circuit, however, found that single-gender institutions are necessary because the adversative process "would destroy . . . any sense of decency that still permeates the relationship between the sexes." *VMI II*, 44 F.3d at 1239. This assumption rests on stereotypes of men as chivalrous protectors of the sensibilities of women from foul language and moral depravity. *See Bradwell*, 83 U.S. at 446 ("Man is, or should be, woman's protector and defender."); *J.E.B.*, —— U.S. at ——, 114 S. Ct. at 1423 (women historically excluded from juries because of the "ostensible need to protect women from the ugliness and depravity of trials"). The State has failed to show that "adversative training" is substantively related to its citizen-soldier goal.[6]

VMI also asserts that complete lack of privacy requires that the entire school be one sex. At VMI, there are no locks on room doors, no curtains on the windows in those doors, and there is "a total lack of privacy in the barracks." *VMI I*, 976 F.2d at 894. Similar intrusive living conditions, however, could be created by simply building a separate barracks for women. *See United States v. Virginia*, 766 F. Supp. at 1443 (describing West Point facilities). This Court must question whether this "priv-

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[6] The State's assertion that the proposed, non-"adversative" program to be established at Mary Baldwin is "substantively comparable" to VMI undermines its own allegiance to the adversative technique. "[I]f the proposed program at Mary Baldwin is truly 'substantively comparable' to the VMI program, the 'adversative' training must not be critical to the VMI program . . ." *United States v. Virginia*, 52 F.3d 90, 93 (4th Cir. 1995) (Motz, J., dissenting from denial of rehearing *en banc*).

acy" justification is merely a pretext for excluding women, particularly given the success of the cceducational United States military academies that graduate far more leaders than does VMI every year.

VMI has failed to demonstrate why its all-male program is necessary to further its purported interest in citizen-soldiers. Means other than excluding women from VMI are available to reach its claimed interest, but VMI refuses to consider them. *See Orr v. Orr*, 440 U.S. at 283. The other justifications offered incorporate impermissible stereotypes and archaic and overbroad generalizations about the roles and abilities of women. *See Hogan*, 458 U.S. at 724-25. VMI has failed to demonstrate an exceedingly persuasive justification for excluding women and this Court should strike down the discriminatory policy.

II. THE PROPOSED VWIL PROGRAM WOULD NOT OFFER WOMEN A VMI EDUCATION AND IS NOT A SUFFICIENT REMEDY FOR THE STATE'S VIOLATION OF EQUAL PROTECTION.

In framing a remedy to repair the denial of a constitutional right, the task is to correct the condition that offends the Constitution. The nature of the violation determines the scope of the remedy. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971). A district court must tailor the scope of the remedy to fit the nature and extent of the violation. *Hills v. Gautreaux*, 425 U.S. 284, 293-94 (1976). The remedy must be designed to eliminate as far as possible the discriminatory effects of the past as well as bar like discrimination in the future. *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

In this case, the violation as articulated by the appellate court in *VMI I* is that the State offers VMI's unique benefits to men and not to women. 976 F.2d at 899. In finding a constitutional violation, the appellate court stressed the distinctive nature of VMI's type of education: "VMI's military program is *absolutely unique*. *No other*

school in Virginia or in the United States, public or private, offers the same kind of rigorous military training as is available at VMI." *Id.* at 898 (emphasis supplied, internal quotations omitted). The court ordered the State to remedy the violation by admitting women to VMI, by withdrawing support from VMI, or by establishing a parallel program for women. *Id.* at 900. The remedy selected by the State is the establishment of an all-female Virginia Women's Institute for Leadership at Mary Baldwin College, a private women's college. The sufficiency of this remedy is now before the Court.

The Virginia Women's Institute for Leadership does not yet exist, and would not offer women VMI's "unique and intense" education program utilizing "adversative" techniques. Women enrolled in the proposed school would instead: take courses in leadership, including research relevant to women and leadership; participate in Saturday seminars sponsored by more senior students on designated subjects; complete a leadership externship; participate in a speakers series; organize and carry out community service projects; participate in ROTC; take physical education, including a "cooperative confidence building program"; and participate in the "largely ceremonial" Virginia Corps of Cadets. *VMI II*, 44 F.3d at 1234. Indisputably, "VWIL would not be organized under the pervasive military regimen that exists at VMI." *Id.*

In short, the Commonwealth of Virginia continues to limit the unique benefits of a VMI-type of education, complete with prestige, tradition and alumni influence, to men. Moreover, VMI continues to challenge the Fourth Circuit's holding that offering the VMI program to men and not to women violates the Constitution. At some future date, women may be able to enroll in a completely different non-"adversative" educational program with no tradition and at best unknown access to prestige or alumni influence. This proposal cannot correct the State's violation of equal protection, even as narrowly defined by the

Fourth Circuit in *VMI I*. Instead, that violation is aggravated by the specter of a two-school system that segregates men and women into separate spheres by restricting prestige and military training to men, and relegating women to community service and a ceremonial corps.

III. THE CONTEMPLATED TWO-SCHOOL SYSTEM, CONSISTING OF VMI AND THE PROPOSED VWIL, CANNOT SURVIVE INTERMEDIATE SCRUTINY.

The proposed VWIL program has not been independently challenged as a violation of equal protection, nor has the contemplated two-school system of VMI and VWIL been so challenged. The proposed VWIL program is offered by the State as a remedy to the violation found in *VMI I*. Despite this procedural posture, in *VMI II* the Fourth Circuit purported to subject the existing VMI and the proposed VWIL to intermediate scrutiny as a two-school system. In a further departure, the appellate court declined to apply intermediate scrutiny as articulated in *Craig v. Boren*, and instead employed a newly created "special intermediate scrutiny" test that replaces the two-prong standard with a singular focus on whether the State offers "substantively comparable" benefits to men and women.

A. The Commonwealth Has Not Shown That the Maintenance of an All-Male VMI and the Creation of an All-Female VWIL Is Substantially Related to Important State Interests.

In *VMI I*, the Fourth Circuit held that VMI's use of single-sex "adversative" techniques is a constitutional means to achieve an interest in "citizen-soldiers," but that the State must offer the "unique benefits" of a VMI-type education to both men and women. 44 F.3d at 890. The State subsequently proposed a completely different type of education for women only, asserting a new interest in promoting leadership and education through single-sex programs that vary for men and for women. 44 F.3d at 1239-41. The shifting justifications offered in this case

only heighten the suspicion warranted where the State's position is fashioned by the *post hoc* findings of state experts and task force members, and where VMI continues to contend that it need not provide *any* remedy for its exclusion of women.

The proposed two-school system that has emerged confirms that suspicions are rightly raised. Even if obtaining pedagogical benefits or promoting leadership were deemed by this Court to be sufficiently important to justify a sex-based classification, the creation of two vastly different educational programs, one for males and one for females, is not substantially related to achieving these objectives.[7] Indeed, fundamental distinctions between VMI and VWIL correlate to stereotyped views about the relative abilities of men and women. While VMI retains a military-style education for males only, females are relegated to a program that stresses leadership development and community service. Only VMI offers a math and science focus and a Bachelor of Science degree. Similarly, the athletic and physical training facilities at VMI are far more extensive and sophisticated than those at Mary Baldwin College. These disparities serve to perpetuate the discrimination and disadvantage that women already face in obtaining military education, pursuing careers in math or science, or participating in athletics.[8]

Were the State's position upheld by this Court, then any state would be permitted to offer completely different

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[7] Even if the expert testimony offered by the Commonwealth were uncontroverted, this evidence does not suggest that vast disparities among the educational options available to males and to females are substantially related to the achievement of pedagogical benefits. *See United States v. Virginia*, 766 F. Supp. at 1434.

[8] Women are often discouraged from pursuing careers in math and science, and face disparities in access to athletics. *See* MYRA SADKER AND DAVID SADKER, FAILING AT FAIRNESS: HOW AMERICA'S SCHOOLS CHEAT GIRLS 120-28 (1994); AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, HOW SCHOOLS SHORTCHANGE GIRLS 28-30 (1982); NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NCAA GENDER-EQUITY STUDY: SUMMARY OF RESULTS tables 1-2 (1992).

educational options to men and to women pursuant to the determinations of a state-appointed task force, with merely a citation to expert testimony regarding the benefits of single-sex education. The Fourth Circuit's ruling in *VMI II* apparently presumes that the assumptions and legal reasoning of an earlier era still hold today. In *Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970), *aff'd*, 401 U.S. 951 (1971), the district court denied a challenge from male plaintiffs to the exclusive policies of a women's college in light of the fact that another state-supported college limited enrollment to men. Applying a rational basis standard [9] and citing pedagogical opinion, the *Williams* court found that the two schools were justified simply because the all-male school was designated as a military school while the all-female school "gave special attention to many courses thought to be specially helpful to female students," described by the state legislature as including stenography, sewing, dress-making, needlework, cooking, housekeeping, "and such other industrial arts as may be suitable to their sex." *Id.* at 136, n.3. The *Williams* analysis does not survive to the present.

The appellate court's analysis attempts to revive the deferential standard applied in *Williams*, and in so doing similarly endorses separate spheres for women and men. While conceding that "there remains some disagreement among the experts about the extent of the benefits of single-gender education," the Fourth Circuit concluded that it should "defer to a state's selection of educational techniques" so long as "the purpose of providing single-

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[9] Among other cases, the *Williams* court cited *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding statute providing minimum wages for women but not men); *Radice v. New York*, 264 U.S. 292 (1924) (upholding statute limiting hours of night work of women); *Goesaert v. Cleary*, 335 U.S. 464 (1948) (upholding statute barring women from bartending); *Hoyt v. Florida*, 368 U.S. 57 (1961) (upholding voluntary jury duty for women but compulsory for men). 316 F. Supp. at 136. This Court has since repudiated such cases. *See Hogan*, 458 U.S. at 725-26 n.10.

gender education is not pernicious." *VMI II*, 44 F.3d at 1239. While such deference was commonly applied prior to *Reed v. Reed*, 404 U.S. 71 (1971), in 1995 it is completely at odds with the jurisprudence of equal protection developed by this Court over nearly twenty-five years and recently articulated in *Hogan*.

B. The Contemplated Two-School System Would Not Even Offer Substantively Comparable Benefits to Men and to Women.

The State asserts that the contemplated two-school system of VMI and VWIL is constitutionally permissible because it would offer men and women "substantively comparable" benefits in that both programs teach discipline and prepare students for leadership. The district court approved the plan, finding that the cooperative method to be offered at VWIL would achieve "substantially similar outcomes." *United States v. Virginia*, 852 F. Supp. at 476. The Fourth Circuit agreed:

> Both VMI and VWIL are focused on *results* beyond simply awarding an undergraduate degree. Both seek to teach discipline and prepare students for leadership. The missions are similar and *the goals are the same*.

VMI II, 44 F.3d at 1240 (emphasis supplied). The appellate court then upheld the contemplated two-school system, and ordered judicial review to ensure that the proposed VWIL program, when compared with VMI, would not tend to "lessen the dignity, respect, or social regard" of women. *Id.* at 1242.

This Court has not endorsed a comparability standard for single-sex schools,[10] and has never recognized a com-

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[10] Nearly two decades ago, the Court summarily affirmed the Third Circuit's opinion in *Vorchheimer v. Sch. Dist. of Phila.*, 532 F.2d 880 (3rd Cir. 1976), *aff'd*, 430 U.S. 703 (1977). A summary affirmance does not enjoy the full precedential value of a case argued on the merits and disposed of by written opinion. *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).

parability standard based on outcome or educational goals alone.[11] In the context of race, a higher standard—"separate but equal"—has been rejected as inadequate. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). Even if an outcome analysis were adequate, the two-school system proposed by the State would not even offer men and women the same degrees.[12] That women may obtain one state-identified benefit--leadership training—at another program does not alter the fact that women are denied virtually all other benefits of the VMI experience and degree.

The little case law that exists regarding the comparability of segregated schools does not limit itself to whether the schools share similar goals, but focuses instead upon the various components of schools, including courses, facilities and faculty, as well as such intangibles as prestige and alumni networks. *See Vorchheimer v. Sch. Dist. of Phila.*, 532 F.2d 880, 881-82 (3rd Cir. 1976), *aff'd*, 430 U.S. 703 (1977). In *Sweatt v. Painter*, this Court stressed intangible qualities "incapable of objective measurement": "Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige." 339 U.S. 629, 634 (1950).

As the dissent noted in *VMI II*, "the contrast between the two [schools] on all the relevant tangible and intangible criteria is so palpable as not to require detailed recita-

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[11] In *Sweatt v. Painter*, 339 U.S. 629 (1950), that the plaintiff barred from an all-white law school could obtain a legal education from another all-black institution did not determine the issue of whether the two schools at issue were "substantially equivalent." *See also Hogan*, 458 U.S. at 723-24 n.8 (1982) (that plaintiff could obtain credit in state-supported coeducational nursing program did not determine constitutional permissibility).

[12] Unlike VMI, Mary Baldwin does not have a math and science focus and does not offer a Bachelor of Science degree. *United States v. Virginia*, 852 F. Supp. at 503. Engineering degrees are only conferred if the VWIL student spends three years at Mary Baldwin College and another two years at Washington University in St. Louis, Missouri. *Id.* at 503.

tion." 44 F.3d at 1250 (Phillips, J., dissenting). VMI offers a military education in a military framework. VMI cadets are required to wear uniforms, live in barracks, eat meals together in a mess hall, complete a boot camp-type regimen, abide by a rigid hierarchy of students, comply with minute regulation of behavior, and regularly take part in parades and drills. *United States v. Virginia*, 766 F. Supp. at 1421-27. In contrast, VWIL would offer leadership education, confidence building and community service requirements. VWIL students would not live in barracks or wear uniforms; beyond ROTC participation, the program would impose no aspect of the rigorous military culture of VMI. *United States v. Virginia*, 852 F. Supp. at 494-98. The appellate court's focus on leadership development as the measure of comparability circumvents scrutiny of the traditional assumptions embodied in the two-school system.[13]

As the dissent correctly noted, VWIL will necessarily be "but a pale shadow" of VMI. "The student and eventual graduate of VWIL will not be able to call on the prestigious name of 'VMI' in seeking employment or preference in her various endeavors; the powerful political and economic ties of the VMI alumni network cannot be expected to open for her; the prestige and tradition of her own fledgling institution cannot possibly ever achieve even rough parity with those of VMI." *VMI II*, 44 F.3d at 1250. The district court conceded that "even if all else were equal between VMI and [VWIL], the VWIL pro-

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[13] Furthermore, the facilities, faculty, student body and resources offered by the two programs are different. The athletic and physical training facilities at VMI are far superior to those that would exist at VWIL. *United States v. Virginia*, 852 F. Supp. at 503. The faculty at Mary Baldwin College is not as accomplished as the faculty at VMI. *United States v. Virginia*, 852 F. Supp. at 502. While VMI has a student body numbering around 1,300, VWIL would likely begin with a class of 25 to 30 students. *VMI II*, 44 F.3d at 1243-44. VMI's endowment is $131 million—the largest of any undergraduate institution in the United States on a per-student basis. VWIL's endowment is $19 million. *United States v. Virginia*, 852 F. Supp. at 502-03.

gram cannot supply those intangible qualities of history, reputation, tradition, and prestige that VMI has amassed over the years." *United States v. Virginia*, 852 F. Supp. at 475. Where women are excluded by the State from a powerful institution and relegated to a less prestigious alternative, the Fourteenth Amendment must bar such discrimination and the inevitable stigma that it imparts.

IV. THE COURT SHOULD TAKE THIS OPPORTUNITY TO ADOPT THE STRICT SCRUTINY STANDARD FOR HARMFUL GENDER-BASED CLASSIFICATIONS WHICH SEEK TO EXCLUDE OR STIGMATIZE.

This case provides the Court with the opportunity to revisit its standard of review for invidious gender-based discrimination and squarely hold that such discrimination merits strict scrutiny. VMI's discriminatory policy seeks to disadvantage women on the basis of harmful and outmoded stereotypes. Such pernicious and invidious discrimination should be subject to strict scrutiny. Furthermore, the distinction between invidious discrimination and remedial or affirmative programs must inform the level of review.

A. The Appropriate Standard of Review Remains an Open Question.

This Court has never formally held that gender-based classifications are inherently suspect. Instead, various Justices have consistently reminded litigants and lower courts that application of the equal protection doctrine for women requires a searching inquiry into the classification at issue, but that the status of women as a suspect class has yet to be determined. *J.E.B.*, —— U.S. at —— n.6, 114 S. Ct. at 1425 n.6; *Harris v. Forklift Systems*, —— U.S. ——, ——, 114 S. Ct. 367, 373 (1993) (Ginsburg, J., concurring); *Hogan*, 458 U.S. at 724 n.9. Now is the time for this Court to eradicate the historical remnants of sex discrimination by extending to women and men the full protection of the Fourteenth Amendment.

This result can only be achieved by subjecting invidious gender classifications to the most rigorous and exacting judicial scrutiny under the Constitution.

B. Women Face Historic and Current Pernicious Discrimination.

Over the past quarter-century this Court has come to recognize our nation's "long and unfortunate history of sex discrimination." *Frontiero*, 411 U.S. at 684 (plurality). As Justice O'Connor observed in *Hogan*, "[h]istory provides numerous examples of legislative attempts to exclude women from particular areas simply because legislators believed women were less able than men to perform a particular function." 458 U.S. at 725 n.10.

Ironically, this Court long endorsed these legislative actions. *See Bradwell*, 83 U.S. at 446 ("in view of the peculiar characteristics, destiny, and mission of women, it is within the province of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men . . ."); *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) ("[t]he fact that women may now have achieved the virtues that men have long claimed as their prerogatives and now indulge in vices that men have long practiced, does not preclude the states from drawing a sharp line between the sexes."). In a series of now discredited cases, this Court also upheld labor laws enacted in the nineteenth and early twentieth centuries designed to protect women based on their perceived frailty. *See, e.g., Muller v. Oregon*, 208 U.S. 412 (1908). It is only recently that the Court has invalidated such measures as violative of equal protection under the law. *See Reed v. Reed*, 404 U.S. at 76.

Although the Court has since recognized that "[n]o longer is the female destined solely for the home and the rearing of the family and only the male for the marketplace and the world of ideas," *Stanton v. Stanton*, 421 U.S. 7, 14 (1975), barriers to women's full equality still

exist. Despite women's gains, discrimination continues to impose obstacles to women's full participation in public life. As recently as last year, this Court addressed a system of ongoing discrimination in jury selection. *J.E.B.*, —— U.S. ——, 114 S. Ct. 1419 (1994). Whether it is employers erecting "glass ceilings" in the workplace, schools and universities devoting fewer resources to women's athletics, or the continued exclusion of women from VMI, both overt and subtle discrimination remains a painful reality that deprives women of opportunities solely because of their sex. Equal protection doctrine must recognize that the continuing discrimination women face is rooted in outmoded perceptions of their proper roles rather than realistic assessments of their abilities relative to men.

A plurality in *Frontiero* recognized that because sex is an immutable characteristic which has been grounds for denying basic civil and political rights to women for centuries, "classifications based on sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." 411 U.S. at 688. The Court has condemned continuing forms of discrimination which "serve[] to ratify and perpetuate invidious, archaic and overbroad stereotypes about the relative abilities of men and women," *J.E.B.*, —— U.S. at ——, 114 S. Ct. at 1422. Nevertheless, this Court has consistently declined to extend to invidious sex-based distinctions the searching judicial inquiry warranted by this history of discrimination.

As women continue to surmount historic barriers, the realm of "valid" distinctions that society perceives to exist between the sexes becomes ever narrower. This Court should acknowledge that classifications which exclude one gender are inherently suspect and unlikely to reflect relevant differences between the sexes. Adoption of a strict scrutiny standard for invidious gender-based discrimination will enable women to overcome the remaining vestiges

of centuries of officially sanctioned discrimination, and accord both women and men the protection that the Fourteenth Amendment's guarantee requires.

C. This Court as Well as State Courts Have Increasingly Recognized the Need for a More Exacting Standard to Judge Gender-Based Discrimination.

This Court has steadily imposed more stringent levels of scrutiny in gender challenges. Beginning with a heightened rational basis standard under *Reed v. Reed*, 404 U.S. 71 (1971), the Court went on in *Frontiero* to enumerate the reasons why gender-based discrimination deserves strict scrutiny. 411 U.S. 677 (1973). In *Craig v. Boren*, 429 U.S. 190 (1976), the Court held that sex-based classifications must be "substantially related to an important governmental interest." Since that case, Justices have used increasingly exacting language to describe the level of scrutiny. In *Hogan*, the Court specified that the asserted state interest must be "exceedingly persuasive." 458 U.S. at 724 (1982).

State courts have already recognized that discrimination against women merits strict scrutiny under state constitutional guarantees. At least ten state supreme courts have interpreted state constitutional equal rights amendments or equal protection clauses in their state constitutions to mandate strict scrutiny.[14] This Court should similarly subject invidious gender-based distinctions to the highest standard of judicial scrutiny.

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[14] *Hewitt v. State Accident Ins. Fund*, 294 Or. 33, 653 P.2d 970 (1982); *Sail'er Inn v. Kirby*, 5 Cal.3d 1, 485 P.2d 529 (1971); *In Re Marriage of Flaherty*, 31 Cal.3d 637, 646 P.2d 179 (1982); *LeClair v. LeClair*, 137 N.H. 213, 624 A.2d 1350 (1993); *People v. Salinas*, 191 Colo. 171, 174, 551 P.2d 703, 705 (1976); *Rand v. Rand*, 280 Md. 508, 374 A.2d 900 (1977); *Darrin v. Gould*, 85 Wash. 2d 859, 540 P.2d 882 (1975); *In the Interest of McLean*, 30 Tex. Sup. Ct. J. 206, 725 S.W.2d 696 (1987); *Lowell v. Kowalski*, 380 Mass. 663, 405 N.E.2d 135 (1980); *Illinois v. Ellis*, 57 Ill. 2d 127, 311 N.E.2d 98 (1974); *Page v. Welfare Comm.*, 170 Conn. 258, 365 A.2d 1118 (1976).

V. CLASSIFICATIONS WHICH SEEK TO ASSIST MEMBERS OF ONE SEX WHO ARE DISPROPORTIONATELY BURDENED ARE NOT INVIDIOUS, AND DO NOT MERIT THE HIGHEST LEVEL OF REVIEW.

If this Court adopts a standard of strict scrutiny for sex-based discrimination, it should also recognize that remedial and non-invidious classifications do not merit the highest standard of scrutiny. Under the Court's current reasoning, the adoption of strict scrutiny may threaten programs that seek to assist members of a particular group in overcoming unique burdens and to thereby promote full societal integration.

While strict scrutiny is the appropriate standard by which to judge classifications that reflect outmoded stereotypes or stigmatize on the basis of sex or race, classifications that seek to *include* or to overcome continuing social disadvantage serve a different governmental purpose and do not merit the highest level of judicial inquiry. This Court's decisions in *Croson*, 488 U.S. 469 (1989) and *Adarand*, —— U.S. ——, 115 S. Ct. 2097 (1995) establish a standard of consistency in evaluating both "invidious" and "benign" classifications. Such a standard, however, eviscerates the purpose and meaning of the Fourteenth Amendment's promise of equal protection: it fails to recognize the moral and historical difference between a tradition of exclusion and an ethic of inclusion. Consistency is a slender reed upon which to fashion Fourteenth Amendment protections.

A. Relevant, Compensatory Classifications Are Within the Original Intended Purpose of the Fourteenth Amendment.

The original intent of the drafters of the Fourteenth Amendment was to permit race-conscious remedial and beneficial government programs. The very Congress which

enacted the Fourteenth Amendment went on to adopt a number of explicitly race-based social welfare programs.[15] That Congress specifically appropriated funds and services "to educate and improve the moral and intellectual condition of . . . the colored youth of the nation," and to relieve the poverty of the freed slaves. Ch. 103, 12 Stat. 796 (1863). Where it created programs available to both blacks and whites, the Reconstruction-era Congress expressly said so. *See* the Southern Public Lands Act of 1866, ch. 127, 14 Stat. 66, 67 (1866). Classifications intended to remedy the present effects of discrimination lie within the central historic purpose of the Fourteenth Amendment. "If this conflicts with idealistic equality, that tension is original Fourteenth Amendment tension, constitutionally conceived and constitutionally imposed, and it is part of the Amendment's very nature until complete equality is achieved. . . ." *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 405 (1978) (Blackmun, J., concurring in part and dissenting in part).

It was in the context of officially sanctioned and injurious discrimination designed to maintain racial separation and subordination that the strict scrutiny standard developed.[16] The standard was designed to challenge that discrimination which harmed, stigmatized, or burdened groups on the basis of race or other immutable characteristics, not to invalidate compensatory legislation. Applying the standard in *McLaughlin v. Florida*, 379 U.S. 184

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[15] For a comprehensive account of the race-based enactments of the Reconstruction-era Congress, *see* Brief of the NAACP Legal Defense and Educational Fund, Inc., as *Amicus Curiae* 7, *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978) (No. 76-811, Oct. Term, 1976).

[16] *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1944) (upholding internment of Japanese-Americans during World War II); *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating prohibition on interracial marriage); *cf. Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (finding that racial classification segregating schools "generates a feeling of inferiority . . . that may affect [schoolchildren's] hearts and minds in a way unlikely ever to be undone.").

(1964), the Court noted that "courts must reach and determine the question whether the classifications drawn in a statute are reasonable *in light of its purpose*—in this case, whether there is an *arbitrary* or *invidious* discrimination." 379 U.S. at 191 (1964) (emphasis added). As recognized by Justice O'Connor in *Croson*, "[c]lassifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." 488 U.S. at 493. *See also Bakke*, 438 U.S. at 357-58 (1978) (opinion concurring in the judgment in part and dissenting in part) ("racial classifications that stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism—are invalid without more.").

B. Programs That Seek to Assist Members of a Group in Overcoming Unique Burdens Need Not Be Subject to Strict Scrutiny.

While strict scrutiny properly challenges invidious discrimination, efforts to assist persons in overcoming disparate burdens and to promote inclusion of all on an equal footing should not be subject to the highest level of judicial inquiry. "[The] principles outlawing the irrelevant or pernicious use of race [are] inapposite to racial classifications that provide benefits to minorities for the purpose of remedying the present effects of past racial discrimination." *Fullilove v. Klutznick*, 448 U.S. 448, 518 (1980) (Marshall, J., concurring).

Harms inflicted on the basis of membership in a disadvantaged class logically merit responses tailored to the nature of the burden.[17] As Justice Blackmun observed in

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[17] Under some circumstances, remedial educational programs for girls or women might be permissible as a means for addressing past and present educational discrimination against women. *See Hogan*, 458 U.S. at 728. Such discrimination includes historical and present disparities in access to math, science and athletics. *See* MYRA SADKER AND DAVID SADKER, FAILING AT FAIRNESS: HOW

Bakke, "in order to get beyond racism, we must first take account of race." 438 U.S. at 407 (Blackmun, J., dissenting in part). *See also Croson*, 488 U.S. at 512 (Stevens, J., concurring in part and concurring in the judgment) ("race is not always irrelevant to sound governmental decisionmaking");[18] *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 317 (1986) (Stevens, J., dissenting) (race conscious measures promoting inclusion should be evaluated under a different standard).

Classifications that promote inclusion do not stigmatize or harm, but promote equality of opportunity by ameliorating the effects of past and continuing disadvantages. "In limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately bur-

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AMERICA'S SCHOOLS CHEAT GIRLS 15-76 (1994); AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, HOW SCHOOLS SHORTCHANGE GIRLS (1992); NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NCAA GENDER-EQUITY STUDY: SUMMARY OF RESULTS (March 1992). Although such programs may target a particular group, they are neither invidious nor do they seek to exclude. Rather, they are vehicles to promote full inclusion and integration in the larger society for those who may face particular obstacles to access.

[18] Support for this position is found in international treaties as well. The International Convention on the Elimination of All Forms of Racial Discrimination provides that "[s]pecial measures taken for the sole purpose of serving adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such individuals or groups equal enjoyment or exercise of human rights or fundamental freedoms shall not be deemed racial discrimination." International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (adopted by the United States Sept. 8, 1992), art. 1, § 4. *See also* International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (adopted by the United States Sept. 8, 1992), arts. 2(2), 3, 26. A treaty ratified by the United States is the supreme law of the land. U.S. CONST. art. VI, cl. 2.

dened." [19] *Hogan*, 458 U.S. at 728. Justice Stevens, dissenting in *Adarand*, criticized the assumption "that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority." —— U.S. at ——, 115 S. Ct. at 2120. Compensatory measures should be evaluated in light of "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 460 (1985) Marshall, J., concurring) (citations omitted).[20]

While this Court lauded "consistency" in *Croson* and *Adarand*, true consistency mandates an application of the

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[19] While assisting women in overcoming historic and present economic disparities is an important and even compelling state interest, affirmative measures must be substantially related to such an interest. In some early cases applying the intermediate scrutiny test, this Court has not always closely examined the relationship, relying instead upon broad generalizations. *See Kahn v. Shevin*, 416 U.S. 351 (1974); *Califano v. Webster*, 430 U.S. 313 (1977). A more precise analysis is found in *Hogan*, in which the Court found that a gender-based admissions policy at a state-supported nursing school was not substantially related to any compensatory purpose. 458 U.S. at 730.

[20] Justice O'Connor remarked in *Croson* that "absent searching judicial inquiry . . . there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegimate notions of racial inferiority." *Croson*, 488 U.S. at 493 (1989). Indeed, judicial inquiry is always warranted in reviewing either racial or gender classifications. However, in *Hogan*, Justice O'Connor was able to "smoke out" the pernicious nature of the classification by applying the lesser intermediate scrutiny standard, despite the state's claim of good intentions: "[A]lthough the State recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification." 458 U.S. at 730.

strict scrutiny standard to all classifications, including gender classifications, that perpetuate the exclusion of any person from the benefits and opportunities of full citizenship on the basis of impermissible criteria. Where classifications seek to combat historic exclusion and afford true equality of opportunity to all individuals, consistency commands recognition of the continuing need for appropriately designed affirmative measures.

CONCLUSION

For all the reasons stated above, the Court should reverse the decisions below and direct entry of judgment for the petitioner.

Respectfully submitted,

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APPENDIX

Amici, the Employment Law Center, A Project of the Legal Aid Society of San Francisco, Equal Rights Advocates, Inc., Chinese for Affirmative Action, National Economic Development and Law Center, Human Rights Advocates, Women's Employment Rights Clinic, Professor Maria Blanco, Professor Connie de la Vega, Professor Marci Seville, and Professor Stephanie Wildman are law firms, civil rights organizations, and law professors who seek to secure and protect the civil and constitutional rights of minorities, women and low income persons. *Amici* have a long-standing and abiding interest in securing the greatest constitutional protection for women and minorities under the Fourteenth Amendment to the United States Constitution. Similarly, *amici* advocate that government agencies be afforded the greatest latitude in their endeavor to increase opportunities for groups previously denied equal opportunity.

They have also represented minority- and women-owned business enterprises in cases involving race and gender-conscious relief, including *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Northeastern Florida Contractors of America v. Jacksonville*, —— U.S. ——, 113 S. Ct. 2297 (1993); and *Adarand General Constructors Inc. v. Pena*, —— U.S. ——, 115 S. Ct. 2097 (1995).

The Employment Law Center (ELC) is the principal project of the Legal Aid Society of San Francisco which was founded more than eighty years ago to provide legal assistance to poor immigrants in San Francisco. For the last two decades, the ELC has focused almost exclusively on employment-related issues that affect the working poor. A pioneer in the employment law field, the ELC is nationally recognized for its expertise in this area.

Now in its twenty-second year, Equal Rights Advocates, Inc. (ERA) is one of the country's oldest women's law centers dedicated to the empowerment of women through

the establishment of their economic, social, and political equality. Since its inception, ERA has specialized in litigating cases and pursuing public policy initiatives designed to assure women equal access to all of society's benefits including employment, education, and public accommodations. A cornerstone of ERA's efforts to gain entry for women into nontraditional jobs has been to secure and maintain strong, effective affirmative action programs.

Chinese for Affirmative Action ("CAA") is a private, non-profit California corporation with over twenty-seven years of involvement in affirmative action. The organization has been a party in class action lawsuits seeking to integrate police and fire departments. In this role, and in numerous other circumstances, CAA has negotiated the terms of affirmative action programs and has provided expertise to many public and private organizations on how to fashion affirmative action programs.

The National Economic Development and Law Center provides legal and technical assistance to organizations promoting employment and economic opportunities for low-income persons. In recognition of the relationship between women's segregation in poorly compensated occupations and the high number of women living in poverty, the Law Center has been engaged, for the past two years, in efforts to break down the barriers which restrict women's access to more highly compensated jobs. Sex discrimination in employment and education is significant among these factors.

Human Rights Advocates is a non-profit California corporation that provides education about the application of international human rights law in both domestic and international fora. The ultimate objective is to advance the cause of human rights so that basic protections are afforded to all individuals. Human Rights Advocates has submitted *amicus curiae* briefs in cases involving individual rights when international standards might be of aid in interpreting state and federal laws.

The Women's Employment Rights Clinic is part of Golden Gate University School of Law. The clinic is staffed by students who work under the direct supervision of the clinic attorneys who are also professors at the law school. The clinic advises, counsels and represents clients in a variety of employment-related matters. Our emphasis is on serving low income clients who often cannot afford legal services when they confront employment problems. Many of our clients are women of color who face both race and gender-based discrimination on the job.

Professor Maria Blanco is a professor of law at Golden Gate University Law School where she specializes in women's economic rights.

Professor Connie de la Vega is a professor of law at the University of San Francisco School of Law specializing in international human rights law.

Professor Marci Seville is a professor of law at Golden Gate University Law School where she specializes in women's economic rights.

Professor Stephanie Wildman is a professor of law at the University of San Francisco School of Law where she specializes in sex and race discrimination and feminist theory.

In light of *amici*'s dual concern for strengthening constitutional protections for women and maintaining programs designed to remedy past and present pervasive discrimination, they urge this Court to overturn the decisions of the Fourth Circuit and require VMI to admit women to its program. While *amici* believe that this is the necessary outcome under the intermediate scrutiny standard, they also suggest that the Court could take this opportunity to decide that strict scrutiny is the appropriate standard for invidious and intentional gender-based classifications. However, in doing so, *amici* urge this Court to recognize the difference between classifications based on invidious, intentional discrimination and classifications intended to

promote inclusion and equal opportunity by taking race or gender into account.

Amici law firms have submitted *amicus* briefs to this Court in numerous sex discrimination cases, including *California Federal Savings and Loan Ass'n v. Guerra*, 479 U.S. 272 (1987); *International Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991); *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616 (1987); *Harris v. Forklift Systems Inc.*, —— U.S. ——, 114 S. Ct. 367 (1993); and *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

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TABLE OF CONTENTS

Page

INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT

I. The Equal Protection Clause Permits States To Offer Single-Sex Educational Programs If The Programs Are Substantially Related To The Achievement Of An Important Governmental Objective 4

II. States Should Be Allowed To Determine How Best To Allocate Their Educational Resources 7

III. The Court Should Not Apply Strict Scrutiny To Gender Classifications 8

CONCLUSION 15

APPENDIX 17

TABLE OF AUTHORITIES

Cases:

Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) 10

Califano v. Webster, 430 U.S. 313 (1977) 11

City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) 9, 10

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 10

Craig v. Boren, 429 U.S. 190 (1976) 11, 12

TABLE OF AUTHORITIES (cont'd)

Frontiero v. Richardson, 411 U.S. 677 (1973) 9
Heckler v. Mathews, 465 U.S. 728 (1984) 11
J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419 (1994) 9
Jenness v. Fortson, 403 U.S. 431 (1971) 4
Kahn v. Shevin, 416 U.S. 351 (1974) 11
Michael M. v. Superior Court, 450 U.S. 464 (1981) 11
Mississippi Univ. for Women v. Hogan,
458 U.S. 718 (1982) ..... *passim*
Parham v. Hughes, 441 U.S. 347 (1979) 11
Patterson v. McLean Credit Union, 491 U.S. 164 (1989) .. 11
Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) 11
Schlesinger v. Ballard, 419 U.S. 498 (1975) 11
United States v. Commonwealth of Virginia, et al.,
44 F. 3d 1229 (4th Cir. 1995) 3
United States v. Commonwealth of Virginia, et al.,
976 F.2d 890 (4th Cir. 1992) 3-5
Wengler v. Druggists Mutual Ins. Co.,
446 U.S. 142 (1980) 2

Constitution:

Equal Protection Clause ..... *passim*

Miscellaneous:

Elizabeth Larson, *Victims in the Workplace*,
INVESTOR'S BUSINESS DAILY, June 2, 1995 14
June E. O'Neill, *The Shrinking Pay Gap*,
WALL STREET JOURNAL, Oct. 7, 1994 13
CHRISTINA HOFF SOMMERS, WHO STOLE FEMINISM?
(1994) 13
U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT
OF THE UNITED STATES (1995) 12-14

Nos. 94-1941 and 94-2107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA

Petitioner,

v.

COMMONWEALTH OF VIRGINIA, *et al.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF *AMICI CURIAE* INDEPENDENT WOMEN'S FORUM, WOMEN'S ECONOMIC PROJECT, DIANA FURCHTGOTT-ROTH, LINDA CHAVEZ, LYNNE V. CHENEY, CHRISTINA HOFF SOMMERS, ABIGAIL THERNSTROM IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE*

The Independent Women's Forum (IWF) is a nonprofit, nonpartisan organization founded by women to foster public education and debate about social and economic policies, particularly those affecting women and families. IWF sup-

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* Letters reflecting written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

ports policies that promote individual responsibility, limited government and economic opportunity.

In April 1993, in an earlier phase of this case, IWF (then known as Women's Washington Issues Network) filed a brief *amicus curiae* in support of the petition for certiorari by the Commonwealth of Virginia and Virginia Military Institute, now Respondents and Cross-Petitioners. In its earlier brief, IWF argued that single-sex educational institutions are an important element in achieving a State's educational mission, that States should be able to tailor educational programs to respond to the distinctive needs and interests of each sex, and that single-sex education should continue to remain eligible for public funding and support.

The names and interests of other *amici* are set forth in the attached Appendix. Many of the individual *amici* are current or former teachers or otherwise active in the field of education. Among the approximately 550 members of IWF many are graduates of all-female schools, and many have family members who have attended single-sex schools. *Amici* strongly believe that single-sex education is an effective and beneficial pedagogical tool, which should be available for both male and female students and in both publicly and privately supported institutions.

SUMMARY OF ARGUMENT

The legal standard set forth in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982), applies to single-sex admissions policies in state-supported schools. The *Hogan* test requires "showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.' *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980)." 458 U.S. at 724.

In this case the fourth circuit court of appeals has twice affirmed the district court's findings that single-sex educa-

tional programs are pedagogically justified and substantially related to achieving an important governmental objective, namely, providing the Commonwealth's citizens a diverse array of educational opportunities. *United States v. Commonwealth of Virginia*, 976 F.2d 890, 897-98 (4th Cir. 1992) (VMI I); *see also United States v. Commonwealth of Virginia*, 44 F.3d 1229, 1239 (4th Cir. 1995) (VMI II). There is no reason, either factual or legal, why this Court should set aside those findings.

Every State has a strong, legitimate interest in providing its citizens a system of education that is both educationally and economically sound. In deciding whether and to whom they will offer specialized educational programs States should be permitted to make reasonable allocations of their resources. The Equal Protection Clause does not deny States the power to treat different classes of persons differently, nor does it require States to confer benefits on all classes equally or equivalently.

The *Hogan* standard imposes an "intermediate" level of scrutiny on sex-based school admission policies. Petitioner has argued in its opening brief in No. 94-1941 that "strict scrutiny is, in fact, the correct constitutional standard for evaluating differences in official treatment based on sex." (U.S. Br. 33) Accepting petitioner's argument would be an unwarranted and unwise departure from this Court's precedents.

Racial classifications are subject to strict scrutiny because we regard racial differences as purely superficial. Differences between men and women, however, are real and substantial. Applying strict scrutiny to gender classifications would be unreasonable and unfair to both sexes. The judgment of the court below applying the "intermediate scrutiny" *Hogan* standard should be affirmed.

ARGUMENT

I. The Equal Protection Clause Permits States To Offer Single-Sex Educational Programs If The Programs Are Substantially Related To The Achievement Of An Important Governmental Objective.

In VMI I, the fourth circuit appeals court acknowledged the practical difficulty of interpreting the Equal Protection Clause.

> The obvious appeal to fairness in requiring the equal application of law too often becomes entangled with generalized notions of equality as referred to in Lincoln's Gettysburg Address and, before that, the Declaration of Independence, and these generalizations tend to overwhelm the difficult task of deciding what is meant by equal protection. We recognize that all persons are in many important respects different and that they were created with differences, and it is not the goal of the Equal Protection Clause to attempt to make them the same. To apply law to different persons with a mind toward making them the same might result, among other things, in the unequal application of the law. Thus, no one suggests that equal protection of the laws requires that all laws apply to all persons without regard to actual differences. *See Jenness v. Fortson*, 403 U.S. 431, 442, 91 S. Ct. 1970, 1976, 29 L. Ed. 554 (1971) ("Sometimes the grossest discrimination can lie in treating things that are different as though they were actually alike. . . .").

VMI I, 976 F.2d at 895 [footnotes omitted].

The difficulty becomes most evident in cases involving classifications based on sex. It is easy to accept the proposition that a person's race or ethnic origin bears no relation to the person's character, abilities or performance; therefore a classification based on race or ethnic origin is inherently suspect – that is, it is assumed to be unjustified and most likely unjustifiable. Sex-based classifications, on the other hand, are

sometimes justified and sometimes not. Men and women share many of the same human characteristics and in many ways are equally capable, but men and women also differ in significant ways. To compound the difficulty, male and female children have differences and similarities that change as they mature into adults.

To apply the Equal Protection Clause intelligently in the case of a gender-based classification, one cannot assume, as one does in the case of race, that the classification is in all likelihood unjustified. Because there are real differences between men and women, a particular law treating them differently might be entirely justified. The only fair way to proceed is to undertake an open-minded inquiry into the substance and purpose of the classification. This is no easy task, as the fourth circuit court and many other courts have remarked, but any other approach would be dishonest and would violate common sense.

Mississippi Univ. for Women v. Hogan, 458 U.S. 718, is the controlling precedent for this case. *Hogan* involved the single-sex admissions policy of a state-supported college. The Court held in *Hogan* that the party seeking to uphold a gender-based classification must show "an exceedingly persuasive justification" for it. Under *Hogan*, a gender-based classification can be justified if it is substantially related to the achievement of important governmental objectives. *Id.* at 724.

VMI's admissions policy, having been exhaustively examined in two trials and two appeals, meets the *Hogan* standard. The Commonwealth's objective has been to provide for the needs of a broad range of students at the post-secondary level. In VMI I, the appeals court accepted the district court's findings of fact, specifically including a factual determination that "single-sex education is pedagogically justifiable, and VMI's system, which the district court found to include a holistic formula of training, even more so." 976 F. 2d at 898.

The appeals court found, however, that the Commonwealth had "failed to articulate an important policy that substantially supports offering the unique benefits of a VMI-type of education to men and not to women." *Id.* at 900. To remedy this deficiency the Commonwealth, in partnership with VMI and Mary Baldwin College, established the Virginia Women's Institute for Leadership (VWIL) program, which incorporates the transferable elements of VMI's system together with elements aimed at the developmental needs of young women.

After a second trial to evaluate the sufficiency of VWIL as a remedy, the appeals court held, in VMI II, that it is a legitimate and important government objective to provide single-sex education as one option within a publicly financed system of education. It also affirmed that the single-sex programs at VMI and VWIL are substantively comparable and will operate so as not to exclude either sex from the benefits of a leadership-oriented "VMI-type" of education.

After two full rounds of trial and appeal below, there can be no doubt that Virginia's system of higher education, which now includes single-sex programs for both male and female students, complies with Equal Protection Clause requirements as articulated in *Hogan*. Petitioner supports its arguments to this Court with a few colorful or offhand statements painstakingly extracted from the record. As respondents' briefs show, these isolated remarks mischaracterize the weight and authority of the testimony by numerous highly qualified experts at two separate trials.

Petitioner invariably condemns as a "stereotype" any fact that interferes with petitioner's preconceived idea about the "correct" outcome of this case. Respondents, on the other hand, have followed *Hogan* and taken its mandate seriously at every step. They have done the hard work of examining their goals and methods, gathering data and expert opinions, studying the options, and justifying their final decision. The outcome – a pedagogically sound and useful program that

fulfills real needs – is where the *Hogan* standard has led them. This Court should affirm the application of the *Hogan* standard in this case so that there will be no future doubt that other States may in a similar manner offer and support single-sex programs among an array of educational methods.

II. States Should Be Allowed To Determine How Best To Allocate Their Educational Resources.

This Court has granted respondents' cross-petition for certiorari on the question whether the Equal Protection Clause, as it was interpreted by the fourth circuit court of appeals, requires states to offer parallel single-sex educational opportunities for both sexes. *Amici* agree with respondents that this question should be settled by this Court's confirming that *Hogan* does not impose any such additional requirement.[1]

Under the existing *Hogan* standard, States must provide an exceedingly persuasive justification for gender classifications by showing that they are substantially related to achieving an important governmental objective. 458 U.S. at 724. If a State statute or action benefits one sex without hurting the other, it is unnecessary to consider the interest of the excluded sex at all.[2] If a State statute or action benefits one sex to the detriment or disadvantage of the other, it may be necessary to consider the interest of the excluded sex, but there may still be "exceedingly persuasive justification" to pursue the program for the benefit of the one sex.[3] If a case arises in

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[1] Respondents have committed themselves to support both the VMI and VWIL programs even if this Court holds that parallel programs are not required when a State offers a single-sex program for either sex. (Va. Opening Br. 3 n.1)

[2] For example, there is no real male parallel to a program for pregnant women.

[3] For example, "boot camp" programs to rehabilitate criminals might be prohibitively expensive if they had to be duplicated for both men and

which fairness dictates parallel programs for both sexes, following the existing *Hogan* standard will reveal this shortcoming: either the objective or the means of achieving it will prove to be faulty under an intermediate scrutiny analysis. We should not assume, as a matter of law, that for every gender-related action there must be an equal and opposite reaction.

In the case of education especially, States should be entitled to consider need, demand and economies of scale when determining whether and to whom they will offer specialized programs. Every child is different from every other child. In an ideal world, to ensure that every child received a perfect education, we probably would assign each one a personal tutor. In the real world, States and localities struggle to allocate limited resources in a way that will provide suitable educational opportunities for most children. The *Hogan* standard should permit States to make reasonable economic decisions relating to the mix of educational opportunities and should not impose additional conditions to achieve a formalistic parallelism for its own sake.

III. The Court Should Not Apply Strict Scrutiny To Gender Classifications.

Petitioner has argued in its opening brief in No. 94-1941 that the Court should adopt for gender classifications the same standard now applicable to race classifications, that is, strict scrutiny. (U.S. Br. 33) The Court should explicitly reject the Petitioner's argument and instead affirm the decision

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women. Rather than limit the choice to "both" or "neither," the Equal Protection Clause should allow states to balance the costs and benefits to all their citizens. Thus, for example, a state might be able to deny female criminals access to a costly parallel program so that society as a whole could obtain the benefit of rehabilitating possibly larger numbers of more violent male criminals.

below by reiterating the standard the Court laid out in *Hogan*, 458 U.S. at 724.[4]

Prior decisions of this Court specifically acknowledge the difference between race and gender classifications and the substantial reasons for those differences. In *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439 (1985), the Court stated the "general rule is that legislation is presumed to be valid, and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." In those cases "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Id.* The Court then continued:

> The general rule gives way however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others. For these reasons, and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny, and will be sustained only if they are suitably tailored to serve a compelling state interest.

Id. The Court then further contrasted the levels of scrutiny given to race and gender classifications, quoting from *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion):

> [W]hat differentiates sex from such nonsuspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.

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[4] The Court most recently invoked the *Hogan* standard in *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1424-25 (1994).

Rather than being "deemed to reflect prejudice and antipathy," laws treating the sexes differently "very likely reflect outmoded notions of the relative capabilities of men and women." *Cleburne*, 473 U.S. at 441.

Despite the fact that mental retardation is an immutable characteristic, beyond the individual's control, affecting a small and readily observable minority who, now and in the past, have been subjected frequently to invidious discrimination, the Court would not upgrade the level of scrutiny applied to this type of legislative classification.

> [I]t would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large.

Id. at 445. Likewise, if gender were deemed a "quasi-inherently suspect" classification, it would be difficult to find a principled way to recognize in law the real differences between the sexes.[5]

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[5] Petitioner and its *amici* have argued that the Court should declare gender an "inherently suspect" classification "to remove any remaining ambiguity" (U.S. Br. 35), "to eliminate confusion in the lower courts, and to resolve serious inconsistencies in the law resulting from this Court's decisions in *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (plurality opinion)" (Brief of *Amici Curiae* National Women's Law Center, *et al.*, 5). Petitioner and its *amici* are mistaken. Ratcheting up the level of scrutiny given to "gender" cases will not produce better informed and better reasoned opinions. Instead it will prompt courts to declare gender classifications *per se* invalid, regardless of the existence of merely "important" state interests supported by only "substantial" rationales. Worse, the prospect of litigation will chill state action, so that programs legitimately aimed at helping one sex (usually women) will simply cease to be adopted.

This Court should not depart from the standard it has followed in every gender-based equal protection case since at least *Craig v. Boren*, 429 U.S. 190 (1976). Indeed, adopting strict scrutiny would directly conflict with this Court's prior decisions applying an intermediate standard to uphold gender-based classifications.[6]

As the Court has noted, "any departure from the doctrine of *stare decisis* demands special justification." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989).[7] Petitioner, however, offers no special justification other than its own conclusion that strict scrutiny is the "correct" standard. (U.S. Br. 33) Petitioner observes that sex, like race, is an immutable and visible characteristic; that the government still employs gender stereotypes in decision making; that historical parallels between official discrimination affecting women and racial minorities exist; and that women suffer "relative political powerlessness." (U.S. Br. 34-36) None of these observations suggests that the Court ought to abandon its firmly established approach to gender classifications. Significantly, petitioner does not argue that intermediate scrutiny is inadequate to address invidious discrimination against women.

In fact, no special justification exists, because intermediate scrutiny is an appropriate standard of review. It subjects gender classifications to a meaningful, "heightened" review while recognizing that differences between men and women – unlike the differences between members of different races – will justify gender classifications in some circumstances.

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[6] *See Heckler v. Mathews*, 465 U.S. 728 (1984); *Michael M. v. Superior Ct.*, 450 U.S. 464 (1981); *Parham v. Hughes*, 441 U.S. 347 (1979); *Califano v. Webster*, 430 U.S. 313 (1977); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974).

[7] This is especially true in the context of a long-established precedent. *See generally Planned Parenthood v. Casey*, 112 S.Ct. 2791, 2808-16 (1992).

Bearing in mind that "proving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause,"[8] we nevertheless offer some statistics to rebut petitioner's unsupported observations.

Women are not politically powerless. Unlike racial minorities, women constitute a majority of the population of the United States; as of 1994, women outnumbered men 51.2% to 48.8%.[9] In the voting age population, women not only outnumber men but consistently register and vote in higher proportions than men.[10] Women already have the political power to elect women to represent them; indeed if all women voted the same and chose to elect only women, virtually every elected office in the United States could be filled by a woman. Instead, women exercise their franchise as individuals and vote for candidates, male or female, as a matter of individual choice.

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[8] *Craig v. Boren*, 429 U.S. at 204.

[9] U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 21, Table 21 (1995) [hereinafter "STATISTICAL ABSTRACT"].

[10] *Id.* at 289, Table 459. About 52% of women report that they are Democrats versus 37% Republicans, with 10% described as independents and 1% as apolitical. Among men, 46% describe themselves as Republicans, 43% as Democrats, 11% as independents, and 1% as apolitical. Id. at 288, Table 458. Women constitute a minority of members of the U.S. Congress, but between 1981 and 1995 their numbers increased from 19 to 47 in the House of Representatives, and from 2 to 8 in the Senate. *Id.* at 281, Table 444. In 1995, there were 84 women in statewide elective office (not including elected judges and elected members of university boards or boards of education) and 1,535 in state legislatures. *Id.* at 285, Table 453. As of 1992, there were over 100,000 women in local elected offices. *Id.* Table 452.

Women are not excluded from the workplace. Overall, women constitute over 45.9% of the civilian labor force in the United States. Among women of all ages, 58.8% work outside the home, versus 75.1% of men. Among those aged 25-54, about 74% of women and 89% of men work outside the home.[11]

Women are not compensated less merely because of their sex. The ratio of female-to-male, year-round full-time earnings was 71 cents on the dollar in 1992. This includes workers of all ages. Among younger workers (ages 25-34) the ratio was 82 cents on the dollar, versus 67 cents for older workers (ages 55-64). "[S]erious economics scholars who are trained to interpret these data (including many eminent female economists) point out that most of the differences in earnings reflect such prosaic matters as shorter work weeks and lesser workplace experience."[12] An "apples-to-apples" comparison yields even more encouraging results. According to research by former Baruch College economics professor, now Congressional Budget Office director, Dr. June E. O'Neill, "among people 27 to 33 who have never had a child, the earnings of women in the National Longitudinal Survey of Youth are close to 98% of men's."[13]

Women are not relegated to the "worst" jobs. Women and men make different career choices, but women's career opportunities are not invariably inferior to men's. According to 1994 Bureau of Labor Statistics reports, women represent 48.1% of workers in executive, administrative and managerial jobs. Women are 61.6% of personnel and labor relations managers, and 79.7% of health and medicine managers. Women are 64.3% of workers in technical, sales and admin-

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[11] *Id.* at 399, Table 627.

[12] CHRISTINA HOFF SOMMERS, WHO STOLE FEMINISM? 240-41 (1994).

[13] June E. O'Neill, *The Shrinking Pay Gap*, WALL ST. J., Oct. 7, 1994, at A14.

istrative support, and 59.6% of workers in service occupations. Women have low representation in production, craft and repair industries (9.3%), among machine operators and laborers (24.3%), and in farming, forestry and fishing (19.3%). These categories include some of the fastest declining occupations, as projected by the Bureau of Labor Statistics for 1992-2005.[14]

Women are not excluded from educational and professional opportunities. In recent years women have steadily increased their representation in the professions and in educational achievement generally. As of 1994, women were 22.3% of physicians, up from 15.8% in 1983, and 24.8% of lawyers and judges, up from 15.8% in 1983.[15] In 1992, 35.7% of M.D. degrees and 42.7% of J.D. degrees were conferred on women.[16] Between 1971 and 1992, the percentage of bachelor's degrees conferred on women rose from 43.4% to 54.2%, from 40.1% to 54.1% for master's degrees, and from 14.3% to 37.1% for doctorate degrees.[17]

Women are not prevented from owning their own businesses. According to the Small Business Administration, between 1980 and 1990, the number of women-owned businesses increased from about 2,000,000 with $25 billion in sales to more than 5,000,000 with over $80 billion in sales. In the same period, when the overall number of business owners increased by 56%, the number of women business owners increased 82%.[18]

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[14] STATISTICAL ABSTRACT, *supra* note 9, at 415, Table 651. Perhaps this is bad news for women, but it is worse news for men.

[15] *Id.* at 411, Table 649.

[16] *Id.* at 192, Table 302.

[17] *Id.* at 190-91, Tables 300-301.

[18] Elizabeth Larson, *Victims in the Workplace*, INVESTOR'S BUSINESS DAILY, June 2,1995.

The term "strict scrutiny" implies that it imposes a more demanding burden of proof than "intermediate scrutiny." In practice, it operates as a presumption of invalidity. The progress made by women in the last generation and the success that increasing numbers of women enjoy today rebut any assertion that they require "strict scrutiny" to protect their interests. Indeed, rather than asking the Court to adopt strict scrutiny as the standard for reviewing gender classifications, a more honest approach would be to ask the Court to take this opportunity to declare women emancipated – to affirm that women are human beings and citizens, with all the rights and responsibilities that entails.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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December 15, 1995

APPENDIX

The Women's Economic Project is a committee formed under the auspices of the Independent Women's Forum. Its members are women who are professional economists. The Women's Economic Project advises and assists IWF in analyzing and evaluating census, survey and other data relating to women in the economy.

Diana Furchtgott-Roth, the chairman of the Women's Economic Project, is a Resident Fellow at the American Enterprise Institute for Public Policy Research in Washington, D.C., where she specializes in economic, tax and regulatory policy issues.

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Christina Hoff Sommers is an associate professor of philosophy at Clark University, Worcester, Massachusetts, who specializes in contemporary moral theory. She is the editor of two ethics textbooks and the author of *Who Stole Feminism?*. She has also published numerous professional papers as well as articles in publications such as The New Republic, The Wall Street Journal, and the New England Journal of Medicine.

Abigail Thernstrom is a Senior Fellow at the Manhattan Institute in New York and an Adjunct Professor of Education at Boston University. She is a member of the Massachusetts State Board of Education. Her book, *Whose Votes Count? Affirmative Action and Minority Voting Rights* (1987), won four awards including the American Bar Association's Certificate of Merit. She attended Barnard College, and has a Ph.D. from Harvard University.

No. 94-1941 and 94-2107

IN THE

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Fourth Circuit

BRIEF AMICI CURIAE OF
THE CENTER FOR MILITARY READINESS,
FAMILY RESEARCH COUNCIL,
THE MINNESOTA FAMILY COUNCIL,
CONCERNED WOMEN FOR AMERICA,
THE RUTHERFORD PROJECT, EAGLE FORUM,
THE CONGRESS FOUNDATION AND
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TABLE OF CONTENTS

TABLE OF AUTHORITIES i

INTEREST OF AMICI 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT:

I. The impact of strict scrutiny for sex-based classifications on military policy choices counsels strongly against eliminating the well-established standard of intermediate scrutiny. 2

A. The impact of strict scrutiny on military policy choices. 4

B. The relationship between the principle of strict scrutiny and the principle of deference to military personnel decisions. . . . 16

II. The impact of strict scrutiny on presently settled questions of federal law counsels strongly against eliminating the well-established standard of intermediate scrutiny. 21

Family Law 23
Employment Discrimination Against Women 24
Girls' Athletics 25
Homosexual Marriage 25
Abortion and Abortion Funding 27

Conclusion 30

Appendix -- List of Amici Curiae 31

TABLE OF AUTHORITIES

CASES:

Attorney General v. Massachusetts Interscholastic Athletic Association,
393 N.E.2d 284 (Mass. 1979) 25

Baehr v. Lewin,
74 Hawaii 645, 852 P.2d 44 (1993) . . . 25, 26, 27

Baker v. United States (No. 94-453C United States Court of Federal Claims) 3, 7, 8

Bowen v. Gilliard,
483 U.S. 587 (1987) 2

Brown v. Glines,
444 U.S. 348 (1980) 2

Caban v. Mohammed,
441 U.S. 380 (1979) 21

Califano v. Goldfarb,
430 U.S. 199 (1977) 21

Califano v. Webster,
430 U.S. 313 (1977) 21

Califano v. Westcott,
443 U.S. 76 (1979) 21

California Federal S. & L. Assn. v. Guerra,
479 U.S. 464 (1981) 12

Campbell v. Beaughler,
519 F.2d 1307 (9th Cir. 1975) 15

City of Cleburne v. Cleburne Living Center,
473 U.S. 432 . . . . . 2, 20

Clark v. Jeter,
486 U.S. 456 (1988) 20

Coleman v. Maryland,
37 Md.App. 322, 377 A.2d 553 (1977) 23

Craig v. Boren,
429 U.S. 190, 197 (1976) 20

Dallas v. Stanglin,
490 U.S. 19 (1989) 19

Davis v. Passman,
442 U.S. 228 (1979) 21

Doe v. Maher,
515 A.2d 134 (Conn.Super. 1986) 28

Fischer v. Department of Public Welfare,
482 A.2d 1137 (Pa.Cmwlth. 1984) 28

Fischer v. Department of Public Welfare,
482 A.2d 1148 (Pa.Cmwlth. 1984) 28

Fischer v. Department of Public Welfare,
509 Pa. 293, 502 A.2d 114 (Pa. 1984) 28

Gilligan v. Morgan,
413 U.S. 1 (1973) 3, 17

Harris v. McRae,
448 U.S. 297 (1980) 28

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,
___ U.S. ___, 132 L.Ed.2d 487 (1995) 24

Idaho v. Freeman,
529 F.Supp. 1107 (D.Idaho 1981) 22

J.E.B. v. Alabama ex rel. T.B.,
511 U.S. ___ (1994) 20

Johnson v. Robison,
415 U.S. 361 (1974) 2

Kadrmas v. Dickinson Public Schools,
487 U.S. 450 (1988) 20

Kelly v. Johnson,
425 U.S. 238 (1976) 15

Kirchberg v. Feenstra,
450 U.S. 455 (1981) 20

Lalli v. Lalli,
439 U.S. 259 (1978) 20

Loving v. Virginia,
388 U.S. 1 (1967) 26

Lyng v. Castillo,
477 U.S. 635 (1986) 2

Maher v. Roe,
432 U.S. 464 (1977) 27

Massachusetts Bd. of Retirement v. Murgia,
427 U.S. 307 (1976) 2, 6

Mathews v. Eldridge,
424 U.S. 319 (1976) 7

Michael M. v. Sonoma County Superior Court,
450 U.S. 464 (1981) 1, 11

Mills v. Habluetzel,
456 U.S. 91 (1982) 20

Mississippi Univ. for Women v. Hogan,
458 U.S. 718 (1982) 20

Moe v. Secretary of Administration,
382 Mass. 629, 417 N.E.2d 387 (1981) 28

NOW v. Idaho,
459 U.S. 809 (1982) 22

Orloff v. Willoughby,
345 U.S. 83 (1953) 17

Orr v. Orr,
440 U.S. 268 (1979) 21

Personnel Administrator of Mass. v. Feeney,
442 U.S. 256 (1979) 21

Petrie v. Illinois State High School Association,
75 Ill.App.3d 980, 394 N.E.2d 855 (1979) . . . 25

Planned Parenthood v. Casey,
___ U.S. ___, 120 L.Ed.2d 674 (1992) . . . 29, 30

Plyer v. Doe,
457 U.S. 202 (1982) 20

Rostker v. Goldberg,
453 U.S. 57 (1981) 12, 18, 20

Schlesinger v. Ballard,
419 U.S. 498 (1975) 11

Shelley v. Kraemer,
334 U.S. 1 (1948) 24

Singer v. Hara,
11 Wash.App. 247, 522 P.2d 1187 (1974) 26

Turner v. City of Baytown,
516 S.W.2d 270 (Tex.Civ.App. 1974) 24

United States v. Young,
1 M.J. 433 (CMA 1976) 15

Weiss v. United States,
114 S. Ct. 752 (1994) 2, 3

Wengler v. Druggists Mutual Ins. Co.,
466 U.S. 142 (1980) 21

ARMY REGULATIONS

Army Regulation 600-8-10, *Leaves and Passes* (1994) 13

Army Regulation 600-9, *Army Weight Control Program* (1992) 13

Army Regulation 611-201, *Military Occupational Classification and Structure* (1994) 11, 12

Army Regulation 635-200, *Enlisted Ranks Update* (1990) 13

Army Regulation 670-1, *Wear and Appearance of Army Uniforms* (1992) 14

Field Manual 21-20, *Army Physical Fitness Training* (1992) 13

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION, Article 1, Section 8 . . . 3

Alaska, Art. I, §3 (1972) 22

Colorado, Art. 2, §29 (1972) 22

Connecticut (Art. I, §20 (1974) 22

Hawaii, Art. I, §3 (1972) 22

Illinois, Art. I, §18 (1971) 22

Louisiana, Art. I, §3 (1974) 22

Maryland, Art. 46 (1972) 22

Massachusetts, Part I, Art. 1 (1976) 22

Montana, Art. 2, §4 (1973) 22

New Hampshire, Part I, Art. 2 (1975) 22

New Mexico, Art. II, §18 (1973) 22

Pennsylvania, Art. I, §28 (1971) 22

Texas, Art. I, §3a (1972) 22

Utah, Art. 4, §1 (1896) 22

Virginia, Art. I, §11 (1971) 22

Washington, Art. 31, §1 (1972) 22

Wyoming, Art. 1, §3 (1896) 22

OTHER AUTHORITIES

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Wendy Shalit, *A Ladies' Room of One's Own, Commentary* (Aug. 1995) 5

"Equal Rights Provisions: The Experience Under State Constitutions," 65 Calif. L.R. 1086 (1977) 23

"Marriage Rights: Homosexuals and Transsexuals," 8 Akron L.R. 369 (1975) 27

"Same Sex Marriages and the Consti tion," 6 U.C.-Davis L.R. 275 (1973) 27

"The Legality of Homosexual Marriage," 82 Yale L.J. 573 (1973) 27

"The State Equal Rights Amendments and Their Impact on Domestic Relations Law," 11 Family Law Quarterly 101 (1977) 27

"The Texas Equal Rights Amendment in the Courts, 1972-77: A Review and Proposed Principles of Interpretation," 15 Houston L.R. 537 (1978) 27

INTEREST OF AMICI

Amici are educational groups concerned about the impact of strict scrutiny for sex classifications on military readiness and family law. Amici support the Commonwealth of Virginia and VMI in this case.

SUMMARY OF THE ARGUMENT

This Court should reject the Government's aside that it use this case to break new constitutional ground and declare sex a suspect class. For the past twenty years, this Court has applied a "carefully developed" intermediate standard of review to sex-based classifications. *Michael M. v. Sonoma County Superior Court,* 450 U.S. 464, 489 n.2 (1981) (Brennan, J., dissenting). This Court always has recognized that race and sex are different and, therefore, that they pose different questions under the Equal Protection Clause. This is because, unlike sex-based classifications, "racial classifications by government always violate the Constitution, for the simple reason that, so far as the Constitution is concerned, people of different races are always similarly situated." *Michael M.,* 450 U.S. at 477. In short, race and sex have not been, and should not be, treated the same under the Constitution for the simple reason that race and sex are not the same. *Id.* at 477-78. Thus, the more rigid approach that inheres in strict scrutiny not only is not required by the Constitution for sex-based classifications, it is not appropriate. Besides the gaping holes in logic and lack of legal portfolio for the Government's theory on "strict scrutiny," twenty years after it first fashioned intermediate scrutiny, and more than a decade after the nation as a whole rejected strict scrutiny for sex classifications by rejecting the federal ERA, it frankly would be unseemly for this Court to surmise today that the Constitution requires a stricter

standard.

Indeed, even in this case the Government does not criticize the intermediate test as unworkable, defective, or a failure in protecting certain groups, in any way. The potential mischief in any attempt strictly to equate sex and race, or the sexes, is seen in its impact on judicial deference to military policy choices and in larger questions now reserved to the States.

ARGUMENT

I. The impact of strict scrutiny for sex-based classifications on military policy choices counsels strongly against eliminating the well-established standard of intermediate scrutiny.

Today the United States asks this Court to break new constitutional ground. It appeals strongly for the right to subject legislative classifications based on sex to the law's strictest scrutiny.

This Court repeatedly has emphasized that separation of powers concerns militate against the creation of new protected classes.[1] *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 441-42 (1985). This caution particularly is apt when the classification arises in the military setting. *See, e.g., Brown v. Glines,* 444 U.S. 348, 354-55 (1980), *Weiss*

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[1] This Court repeatedly has refused to create new suspect classes. *See, e.g., Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 313 (1976) (elderly); *Cleburne,* 473 U.S. at 442 (mentally retarded); *Lyng v. Castillo,* 477 U.S. 635, 638 (1986) ("close relatives"); *Bowen v. Gilliard,* 483 U.S. 587, 601-03 (1987) ("families"); *Johnson v. Robison,* 415 U.S. 361, 375 n.14 (1974) (conscientious objectors).

v. United States, 114 S. Ct. 752 (1994). It is well-settled that judicial deference---that is, deference in addition to the deference that inheres in the rational basis test itself--- "is at its apogee when reviewing congressional decision-making in [the military context]." *Id.* at 760-61. Indeed, it is Congress, not the Judicial Branch, that has the explicit and exclusive constitutional prerogative to "raise and support Armies [and to] make Rules for the Government and Regulation of the land and naval forces." Article I, section 8, UNITED STATES CONSTITUTION.

Thus, the judiciary always has accorded great deference to military decisions, on the separation of powers ground, that "ultimate responsibility for [the armed forces] is appropriately vested in branches of the government which are periodically subject to electoral accountability." *Gilligan v. Morgan,* 413 U.S. 1, 10 (1973).

The matters underlying the judicial principle of deference to military policy choices, then, are too weighty to be disposed of by a footnote, as the Government attempts to do. Br. for Pet. at n.23. The plain reality is that the Government's invitation to impose strict scrutiny on sex-based classifications will---indeed, philosophically, *must*---affect both the judiciary's role in military policy-making and, ultimately, military policy.[2] It cannot be gainsaid that the Government today asks this Court to take a big step, that of

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[2] Although the Government relies on its steadfast contention that the instant case is not a military case, Br. for Pet. at n.23, that contention is quite beside the point. What the Court decides today immediately will affect policy and policy debates within the armed forces. *See, e.g., Baker v. United States, infra* note 6 (discussing application of strict scrutiny of sex-based classifications to a "reverse discrimination" claim brought by male colonels and pending in the United States Court of Federal Claims).

creating a new suspect classification subject to strict scrutiny. As always, but especially here where this new standard would implicate strongly a venue committed wholly to a coordinate branch of government, it is imperative to look hard before one leaps.

A. The impact of strict scrutiny on military policy choices

Plainly, as detailed below, the principle of strict scrutiny, applied to sex-based classifications, is in tension---if not outright conflict---with judicial deference to military decisions. These policies reflect, what might be called in the vernacular, the facts of life. And how society arranges itself in regard to those facts, to a large degree, reflects social consensus, arrived at through the constantly fine-tuned social contract that is the object of democracy. For example, the Government cites privacy considerations that are furthered by providing separate quarters and bathroom facilities for men and women. It then states, in conclusory fashion, this separate treatment furthers compelling governmental interests. Br. for Pet. at n.25.

The Government's conclusion regarding its compelling interests in individual privacy may have merit, but it is at least untried.[3] Moreover, the fact the Government felt

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[3] If the Government does have a compelling interest in how society arranges itself in regard to cognizable differences between men and women, the Government's charter goes back to that social consensus, not to the Constitution. Plainly, the question of whether it is appropriate to provide "separate arrangements for men and women while sleeping and while using bathroom and shower facilities" is a quintessential social question based on the fact there exist cognizable differences between men and women that do not exist between members of various races. If the social consensus changed tomorrow---and under this new contract "gender privacy" was deemed a social evil---the Government's claim to a

compelled to style separate quarters for men and women as furthering a compelling governmental interest itself demonstrates that matters of general social consensus must be revisited if strict scrutiny is applied to sex-based classifications.

Indeed, the government's own analysis proves why it asks too much when it invites this Court to apply strict scrutiny to policy choices that reflect distinctions based on sex. What the government gives, it immediately takes away.

The entire practical and analytical problem posed by ratcheting sex-based classifications up to strict scrutiny is encapsulated in footnote 25 of the Government's brief:

> Strict scrutiny of . . . classifications based on sex will not necessarily be "fatal in fact." For example, where discrimination persists, "government is not disqualified from acting in response to it." *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2117 (1995). The compelling interest in respecting individuals' privacy would clearly justify separate arrangements for men and women while sleeping and while using bathroom and shower

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compelling government interest in separate showers for men and women might ring hollow. *See, e.g.*, Wendy Shalit, A Ladies' Room of One's Own, Commentary at 33 (Aug. 1995). The point is not whether the policy-maker might show a compelling reason for differentiating between men and women in any given factual setting. Rather, the point is that strict scrutiny would *require* such a reason in *every* setting, and that requirement is unwarranted, both because the underlying distinctions are rational more often than not and because the Constitution leaves these common sense matters---and the right to change their collective mind regarding them---to the people.

facilities. Br. for Pet. at n.25.

Clearly, the Government seeks a rule that sows the seeds of its own destruction. To work, the law would be required to keep in perfect tension, much like juggling four pins in the air at all times, at least these tenets:

- Because distinctions between men and women are irrational *per se*, strict scrutiny is required for policy choices that reflect distinctions between men and women.[4]

- Moreover, strict scrutiny requires *individualized* scrutiny. That is, policies that reflect distinctions between men and women fail strict scrutiny, for example, if one woman does not conform to the characteristics of the class as a whole.[5]

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[4] Br. for Pet., *e.g.*, at 44-45.

[5] *Id.* Plainly, the rule of law presupposes the creation of categories. *See, e.g., Massachusetts Bd. of Retirement*, 427 U.S. at 314. *Imposition of strict scrutiny, however, presupposes the relevant category is illicit.* Therefore, it is incumbent on the policy-maker to make wholly individualized determinations regarding members of the class for whom classifications are strictly scrutinized. In other words, as the Government argues, Br. for Pet. at 44-45, it would be impermissible ever to make policy choices based, *e.g.*, on the fact that "job related physical requirements would necessarily exclude the vast majority of women Service members." Note 20 and accompanying text, *infra*. Indeed, the Government argues that VMI's admission policy fails strict scrutiny because:

> [The lower] court . . . did not purport to find---nor could [it] possibly have found---that *all* women are less aggressive or less confident than *all* men, or that VMI's program was educationally inappropriate for *all* women. . . . The court . . . approved the VWIL program on the premise that *average* psychological and sociological

- But, if the Government determines that "discrimination persists," the Government can impose sex-based policies (such as affirmative action) to respond to that discrimination, and, moreover, to respond to it on a class-wide basis without regard to the merit of any individual in the favored or disfavored class.[6]

> differences between the sexes can justify denying *all* women admission to an educational program that some fully qualified women want to enter. . . . Women whose choices or abilities are different from those of the "typical" or "average" woman cannot be denied an important educational opportunity . . . solely because most women would not be inconvenienced by that limitation.

Br. for Pet. at 44-45 (original emphasis). Thus, even if the vast majority of women, for example, cannot meet standards for a particular position, the Government urges that policy-makers nevertheless are required by the Constitution to attempt to find that one woman who does meet standards (or, in point of fact, to "gender-norm" the standards) and then, regardless of cost to the organization, to accommodate her in that position. This elaborate "logic" has no analogue in questions regarding race-based classifications---precisely because this "logic" is without portfolio from the Equal Protection Clause. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (one factor in the due process analysis is "the Government's interest, including the *function involved* and the *fiscal and administrative burdens*" entailed in the policy choice) (emphasis added).

[6] *See, e.g., Baker v. United States* (No. 94-453C United States Court of Federal Claims). *Baker* was brought by 83 white male colonels who were selected by an administrative board for involuntary early retirement from the Air Force in 1992. The secretarial memorandum of instruction to the board required the board, upon completing its selections for involuntary retirement, to render a report concerning the selection rate for minorities and women. The board's report to the Secretary indicated the files of minority and female officers had received preferential treatment in determining which officers would be involuntarily retired and which would continue on active duty.

In its supplemental motion for summary judgment in *Baker*, the United

- And, finally, even though strict scrutiny is required

States informed the court in a footnote:

> The Government's November 16, 1995 brief in United States v. Commonwealth of Virginia, 94-1941 (U.S.), asserts that strict scrutiny should be applied to classifications that deny opportunities to individuals based upon their sex. In so doing, however, the Government's brief specifically distinguishes executive and legislative branch programs and policies having to do with the Federal Government's conduct and control of military affairs. As to military affairs, the Government's brief suggested that courts should continue to defer to executive and legislative branch judgments [citations omitted]. To the extent that our prior briefs argued that gender distinctions are subject, at most, to an intermediate level of judicial scrutiny * * * we withdraw that argument. As we have demonstrated, however, the military judgments implicated in this case deserve the judicial deference reflected in the above-cited cases, whatever level of scrutiny is applied.

Baker v. United States (No. 94-453C United States Court of Federal Claims) (Defendants' Supplemental Motion for Summary Judgment); *but cf.* note 9, *infra*.

Colonel Baker now argues, if strict scrutiny applies to sex-based classifications, first, such scrutiny is inconsistent with judicial deference to military policy choices and, secondly, his reverse discrimination claim now even is stronger since his selection for involuntary retirement was based, in part, on his sex.

This controversy is no small point, especially in light of the scope and magnitude of the various personnel decisions required to reduce the size of the United States armed forces from its Cold War high. *See, e.g.*, Karen Jowers, Women Have Been Treated Equally, Military Says, Air Force Times (Nov. 27, 1995) ("women have fared about the same as men in the reduction of the military forces during the drawdown, and sometimes better, military officials say. * * * In the Air National Guard . . . the number of women increased by two-tenths of a percentage point from fiscal 1993 to 1994, from 13.9 percent to 14.1 percent, although the Air Guard overall shrank by 3.1 percent during the period. * * * In the Marine Corps, 1.9 percent of the officers who were selected for [involuntary] retirement were women, even though women make up 3.6 percent of the Marine officer corps").

because distinctions between men and women are irrational *per se*, existing policy distinctions between men and women (such as separate quarters and bathroom and shower facilities) are permitted because the distinctions between men and women are compelling.[7]

It is not too strong to say, then, that what the Government urges is not strict scrutiny, as a controlling legal principle for reviewing sex-based policy choices, at all. Rather, it advocates simply for a larger constitutional writ to equalize various situations as it sees fit, not to provide equal protection under the law.

In essence, the Government advocates for a constitutional writ to impose strict scrutiny on policy choices that disfavor a favored group and to insulate from strict scrutiny policy choices that favor a favored group, upon no more principled basis than the notion of "it all depends on whose ox is being gored." But the real issue is whether the Constitution requires that the law must say that "what is good for the goose is good for the gander" *and mean it in every instance.*

The Government's view of "strict scrutiny" for sex-based classifications may regard a fashionable notion of "equalized" protection of the law, but it conforms nowhere to the Equal Protection Clause. At best, and this is not great, the practical result of the "strict scrutiny" urged by the Government is "intermediate scrutiny *plus*"---plus more lawsuits, plus more judicial intervention in the social contract, plus more confusion (if not plain incoherence) in the law. Either way, the outcome is not more beneficial, to either the regulated class or the law, than the flexibility to countenance common

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[7] Br. for Pet. at n.25.

sense distinctions between men and women that inheres in the present standard of review as intermediate scrutiny.

Indeed, it is *because* there exist legally and practically cognizable differences between men and women that, even as it urges this new standard of review, the Government attempts to attenuate the searching judicial inquiry that is part and parcel of strict scrutiny. It is counterintuitive to urge strict scrutiny---not only the highest standard of review known to the law, but, by its own philosophical design, a "hard and fast" rule---for policy choices based on sex, but then to argue that existing policy choices that reflect distinctions between men and women are supported by compelling governmental interests. This is a case where the proposed exceptions to the proposed rule prove the inadvisability of the rule in the first instance.

First, in this very case, the Government attempts to straddle the hard and fast view of strict scrutiny and the greater flexibility that inheres in intermediate review. It argues that the decision to exclude women from VMI fails strict scrutiny because distinctions between men and women are irrational *per se*. Br. for Pet., *e.g.*, at 44-46. But the Government also argues, once women are admitted to VMI, *based on distinctions between men and women*, the government has a compelling reason to "justify," for example, separate quarters and facilities for men and women. Br. for Pet. at n.25.

Likewise, unless the Government today urges a grand remodeling of society, not to mention the armed forces, the "strict scrutiny" advocated by the Government leaves policy-makers with much explaining to do. The Army's decision to

exclude women from certain military schools,[8] for example, hardly could withstand strict scrutiny since the application of that standard of review intrinsically concludes policy distinctions between men and women are irrational in the same way it is irrational to make distinctions between races. But, to follow the Government's reasoning, once women are admitted to those military schools, the distinctions between men and women that were irrational become so rational they give rise to compelling governmental interests that justify actually treating women differently than men.[9] Br. for Pet.

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[8] *See, e.g., Army Regulation* 611-201 at 13-15 (female soldiers may not attend the Infantry, Armor, or Special Forces School). Other schools or schooling may be closed to female soldiers based on the prerequisite of certain military occupational specialties. *See* note 11, *infra.*

[9] The Government is careful to concede only that "the phenomena of sex and race *discrimination* differ from each other in some important respects," all the while it claims *sex* and *race* are interchangeable for purposes of suspect classification. Br. for Pet. at 36; *see also* All-male VMI Faces Ruling: Supreme Court to Decide Whether the School Can Bar Women, Air Force Times (Oct. 23, 1995) ("[t]he Clinton administration says the only way to guarantee women equal treatment is to admit them to VMI. A separate 'women's VMI' begun this fall is as unlawful as segregated schools once created for blacks and whites, administration lawyers contend").

As the Government's theory in the instant case proves, however, the analogy between sex and race stops at the front gate. It would be grotesque to suggest the armed forces "clearly [could] justify separate arrangements for [blacks and whites] while sleeping and while using bathroom and shower facilities," yet just such a conclusion makes imminent good sense even to those advocating strict scrutiny for sex-based classifications. *See, e.g.,* Br. for Pet. at n.25; *cf.* Br. of *Amici* Cornum *et al.* at 14 ("[c]reating a separate barracks floor for women could maintain [VMI's adversative methodology] for men and impose the same [methodology] on the women vis-a-vis other women"); *see also, e.g., Rostker,* 453 U.S. 57; *Schlesinger v. Ballard,* 419 U.S. 498 (1975); *Michael M.,*(upholding sex-based classifications under intermediate

at n.25.

Under the rubric of strict scrutiny for sex-based classifications, this is the only reasoning---never mind that it is logically inconsistent and internally contradictory---that could allow the armed forces to continue to fashion sex-based distinctions that range from the sublime to the minute:

- to draft men and not women;[10]

- to involuntarily assign men, but not women, to direct combat positions;[11]

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scrutiny); *cf. also California Federal S. & L. Assn. v. Guerra,* 479 U.S. 464 (1981).

Why? Because sex and race have important and cognizable differences. Those differences, which all relate to cognizable differences *between members of the class based on sex,* render strict scrutiny workable for race-based classifications and unworkable for sex-based classifications.

[10] *See Rostker v. Goldberg,* 453 U.S. 57 (1981) (subjecting only men and not women to involuntary military service justified by the fact that only men were sent into direct combat); *Report of the Presidential Commission on the Assignment of Women in the Military [Commission]* (Aug. 28, 1992) at Findings 4.7-4.10 and 1.63 (Office of Secretary of Defense testimony was "women were not in combat in the Gulf War").

[11] The Army, for example, presently excludes female officers from the Armor, Infantry, and Special Forces branches. Army Regulation 611-201, *Military Occupational Classification and Structure* (1994) at 4. It also excludes enlisted women from 45 military occupational specialties, for example, 11C (Indirect Fire Infantryman), 11M (Heavy Antiarmor Weapons Infantryman), 12D (Engineer Tracked Vehicle Crewman), 13B (Multiple Launch Rocket System/Lance Operations/Fire Direction Specialist), 14B (Line of Sight-Forward-Heavy Crewmember), 18B (Special Forces Weapons Sergeant), 45D (Self-propelled Field Artillery Turret Mechanic), 45B (Bradley Fighting Vehicle System Turret Mechanic), and 63E (M1 ABRAMS Tank System Mechanic). *Army Regulation 611-201* at Table 4-1.

- to provide separate quarters and facilities for women;[12]

- to require women to run two miles in 18 minutes and 54 seconds and accomplish 50 sit-ups and 18 push-ups while men must run two miles in 15 minutes and 54 seconds and accomplish 52 sit-ups and push-ups;[13]

- to provide "non-chargeable" leave for mothers, but not fathers, after the birth of a child;[14]

- to permit women to curtail their enlistment at their request by reason of pregnancy while men have no comparable grounds to request to early discharge;[15]

- to find women fit for duty with up to ten percentage points more body fat than men;[16]

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[12] *See, e.g.*, note 20 and accompanying text, *infra*.

[13] Field Manual 21-20, *Army Physical Fitness Training* (1992) at Chapter 14; *see also, e.g.*, Jonathan T. Ullyot, A Lesson in Military History from The Citadel, Washington Times (Aug. 23, 1995) (women going through Officer Candidate School in the Marine Corps are provided special ramps to help them negotiate the obstacle course; men are required to march with their gear (increasing their rucksack weight by 30 pounds) while women march with empty rucksacks and their gear is trucked to the rifle range).

[14] Army Regulation 600-8-10, *Leaves and Passes* (1994) at 13.

[15] Army Regulation 635-200, *Enlisted Ranks Update* (1990) at 41-42 (pregnant soldiers granted discharge at their request).

[16] Army Regulation 600-9, *Army Weight Control Program* (1992) at 4. News reports on Nancy Mellette, a woman who intends to apply for

- to provide women with a military clothing allowance that is larger than that provided to men;[17]

- to permit women to have long hair while men must have short hair or shave their heads;[18]

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admission to The Citadel, record this colloquy between Mellette and a reporter: "Asked her weight, Mellette pluckily replied, *'Don't you know you're not supposed to ask women that question, sir?'*" Mellette Ready For Citadel, Associated Press (Sept. 6, 1995) (emphasis added).

[17] *See, e.g.*, Neff Hudson, Uniforms Cost More, But Allowances Rise, Air Force Times (Sept. 18, 1995) ("[the clothing] allowances vary for men and women because they have different clothing. Generally, women's uniforms are more expensive, so their allowances are bigger. . . . For male Air Force members, the initial clothing allowance will be $829.61 . . .. Female Air Force members will get an initial allowance of $1,017.93 . . . The Army's initial allowance for male enlisted members will be $958 in fiscal 1996 . . . for female soldiers, the initial allowance will be $1,171.16 . . . Again, enhanced [Battle Dress Uniforms] are the biggest change to the [clothing] list, although women also will get an improved neck tab that costs $4.25 more. Male Marines will get an initial allowance of $923.30 . . . Female Marines will get an initial allowance of $1,147.07").

[18] Army Regulation 670-1, *Wear and Appearance of Army Uniforms* (1992) at 12 (grooming policies for men and women). The role of cultural factors in different standards of appearance for men and women is amenable to intermediate but not strict scrutiny, as seen in recent events surrounding Shannon Faulkner's admission to The Citadel.

Upon obtaining court-ordered admission to The Citadel, Ms. Faulkner sought exemption from The Citadel's traditional "knob" haircut. "Buzz cut" next for Citadel's 1st woman, Detroit News (Aug. 11, 1994)("U.S. District Judge C. Weston Houck . . . said there was no reason to spare [Ms. Faulkner's] hair. 'In making this request for a different haircut, *the plaintiff is asking for unequal treatment.*' The school argued against any such special consideration. 'If the haircut is the first thing, what will be the next?' Citadel lawyer Dawes Cooke asked. 'What is the next thing Ms. Faulkner will find at The Citadel which is not appropriately feminine?'") (emphasis added).

- to allow women to wear earrings and make-up in uniform while men may not;[19]

Indeed, in his Memorandum dated January 13, 1994, then-Secretary of Defense Les Aspin directed the military services to "expand opportunities for women" with the "following restrictions on [their] assignment: where the Service Secretary attests that the costs of appropriate berthing and privacy arrangements are prohibitive * * * [and] where job related physical requirements would necessarily exclude the vast majority of women Service members."[20]

The Department of Justice asked the district court to reconsider allowing The Citadel to shave Ms. Faulkner's head, claiming the school was proceeding "under *the guise of gender-neutral grooming policies* [that] implement rules which altogether denigrate Ms. Faulkner's *identity as a woman*." The Citadel responded that "[t]he Justice Department motion 'points up some of the paradoxes at work here. On the one hand they espouse the position there are no significant cultural differences between men and women that would justify separate treatment. But now that she's admitted, they say there are cultural differences which mandate separate treatment.'" Justice Department hopes second cut saves cadet's hair, Washington Times (Aug. 6, 1994) (emphasis added). *Cf. Kelly v. Johnson,* 425 U.S. 238 (1976) (upholding grooming standards for police departments); *Campbell v. Beaughler,* 519 F.2d 1307 (9th Cir. 1975), *United States v. Young,* 1 M.J. 433 (CMA 1976) (rejecting male servicemembers' claim that it violated the Constitution to require them, but not female servicemembers, to have short hair).

[19] *Army Regulation 670-1* at 12 (cosmetics and jewelry) and 18 (handbags and purses authorized only for female soldiers).

[20] The Naval Reserve Association's *EXCOM BULLETIN*, December 1994, reported: "Ship modifications costs for the Women at Sea Program are estimated to be $200 million or more. The estimated cost to modify the carrier Nimitz alone is $2.6 million. The newer carriers . . . that have not previously had . . . berthing modifications could cost as much as $6 million each. The carrier Lincoln cost $1.9 million in 1994."

Memorandum from the Secretary of Defense, Subject: Direct Ground Combat Definition and Assignment Rule (Jan. 13, 1994).

The point is clear: for purposes of determining the judicial necessity for strict scrutiny in regard to sex-based classifications, *either the law brooks no differential treatment between men and women or it brooks some.* If it brooks some---and even the Government concedes, and urges on this Court, that it does---then intermediate scrutiny for sex-based classifications remains not only appropriate wholly, but necessary absolutely.

Indeed, it is apparent the Government seeks only the intellectual solace of claiming strict scrutiny for sex-based classifications. Demonstrably, the result it urges, *in fact*, is no more and no less than the result under the intermediate standard of review which, even under the Government's theory, provides a consistent, coherent analytical framework in which to resolve *both* the issue of whether women must be admitted to VMI and the inherent issue of whether it is permissible to accommodate them if they are admitted. Another approach, which is neither consistent nor coherent, cannot be commended to the law.

B. The relationship between the principle of strict scrutiny and the principle of deference to military personnel decisions.

In frank terms, the Government's attempt, in a footnote, to preserve the military's prerogative to make the common sense distinctions now permitted, without fanfare, under intermediate scrutiny is a dodge in the first degree. As a matter of principle and philosophy, the searching judicial inquiry required by strict scrutiny *cannot* avoid diminishing

the scope of judicial deference to military policy choices traditionally required under the law. Rather, strict scrutiny of sex-based classifications would reduce that judicial deference to a very thin reed indeed. And it would be this thin reed upon which would rest "our entire constitutional system." *Gilligan,* 413 U.S. at 10.

The plain fact of the matter is strict scrutiny for classifications based on sex would require a compelling governmental reason *each time* men and women are treated differently. Since, particularly in the military, such policy choices range from the sublime to the minute, courts quickly would find themselves drawn in to the very task this Court admonished the Judiciary not to do. As the Court pointed out succinctly in *Orloff v. Willoughby,* "judges are not given the task of running the army."[21] *Orloff v. Willoughby,* 345 U.S. 83, 93 (1953).

While practical reasons for judicial deference to military policy-making often are advanced and relied upon, the principle of deference is more, and more important, than a recognition of the practical reality that "it is difficult to conceive of an area of governmental activity in which the

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[21] The question before the Court in this case is whether, through the imposition of strict scrutiny, the Constitution *requires* the Judicial Branch to demand the armed forces provide a compelling reason---moreover, as the Government advocates, Br. for Pet. at 44, a compelling reason narrowly tailored to each individual woman---for its policy choices. Manifestly, since "strict scrutiny" means what the Government says it does, that the military must prove a compelling reason why a particular woman was not enlisted as a Multiple Launch Rocket System/Lance Operations/Fire Direction Specialist, manifestly, upon imposition of strict scrutiny, "judges [would be] running the army." *Orloff,* 345 U.S. at 93; *cf.* note 9, and accompanying text, with notes 10-20, and accompanying text, *supra.*

courts have less competence" than military affairs. *Rostker v. Goldberg*, 453 U.S. 57, 65 (1981). Rather, deference is required by the Constitution itself.[22] *Id.* at 67. Indeed, deference is a critical component of the Constitution's separation of powers among the coordinate branches of government. As the Court strongly has counseled, *because* the military is under the exclusive constitutional control of the Legislative Branch, deference to military judgment "*underlies*

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[22] The Founding Fathers' decision to commit the armed forces, through their elected representatives, to the control of the people concurs with the theories of Clausewitz in his military classic, *On War*. Whether the question is battle plans or personnel policies, Clausewitz observed that "the task for the military theorist . . . is to develop a theory that maintains a balance among the trinity of war---the *people*, the *government*, and the *[military]*. A theory that ignores any one of them or seeks to fix an arbitrary relationship between them would conflict with reality to such an extent that for this reason alone it would be totally useless." Summers, *On Strategy: A Critical Analysis of the Viet Nam War* (1984) at 36-37.

Thus, in striking that trinitarian balance, force composition and deployment decisions must factor in physical and other practical requirements, as well as recruiting and retention factors, especially in regard to an all-volunteer force, political factors, and even make "rough accommodations" regarding the remarkable dynamics of sexuality and human nature.

These realities are not blithely glossed over. *See, e.g., Commission* at Finding 4.22 (*re:* Moskos Survey, Table 7 (33% of female servicemembers surveyed said they "definitely would leave" the armed forces if women were compelled to serve in direct combat; another % said they "probably would leave" and 7% were "not sure" how such a change would impact their desire to remain in service; only 14 said they "definitely" would remain in service)); *Pregnancy, romance problems for carriers,* Florida Times-Union (March 19, 1995) ("last year the *Eisenhower* became the Navy's first carrier with women as permanent crew members; 415 now serve among the [4,967-member crew]". . . . 38 *Ike* sailors became pregnant since the crew first went aboard nine months ago; 14 pregnancies occurred in the first six months at sea).

our entire constitutional system."[23] *Gilligan,* 413 U.S. at 10.

The predicate for the rational basis test---the practical reality that makes this deferential standard appropriate and workable---is the fact, to use equal protection terminology, that in the vast majority of policy choices there is no reason to "suspect" the choice was illicit. Indeed, this Court has held that a general rule that took a less flexible approach to determining statutory validity would vitiate "the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their view of what constitutes wise . . . social policy." *Dallas v. Stanglin,* 490 U.S. 19, 27 (1989).

Strict scrutiny, manifestly, is the diametric opposite of rational basis review. Only the most compelling reasons, narrowly tailored, are sufficient to support the legislative choice. As a practical matter, the imposition of strict scrutiny reflects a policy judgment that the reasons for the legislative classification *rarely* will be sufficient. In other words, the imposition of strict scrutiny for sex-based classifications *presupposes* that such classifications "*seldom* [are] relevant to the achievement of any legitimate state interest." *Cleburne,* 473 U.S. at 440 (emphasis added).

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[23] The constitutional scheme which placed the raising and regulation of the armed forces under the exclusive control of the Legislative Branch was no accident. As one military analyst has noted, "*The Federalist Papers* clearly show . . . the Founding Fathers deliberately rejected the idea of an 18th century-type Army answerable only to the Executive. They wrote into the Constitution specific safeguards to ensure the people's control of the military." Summers, *supra* note 22 at 37. This constitutional commitment of the armed forces to the people's control is vouchsafed by the important principle of judicial deference.

Intermediate scrutiny, which this Court has accorded to sex,[24] reflects the practical reality, based on cognizable differences between men and women, that ordinarily those differences between men and women may be reflected in policy choices, but that there exists a somewhat greater-than-usual potential that sex-based distinctions may not be rational.

In other words, intermediate scrutiny strikes a judicious balance between the role of the courts in administering constitutional parameters and the need to give policy-makers appropriate leeway---in widely-ranging factual settings---to account for the fact of life that men and women have certain differences that must be addressed, and sometimes protected, separately under the law. Thus, while intermediate scrutiny recognizes that *sometimes it is rational* to make policy distinctions based on sex, strict scrutiny, at least if applied coherently, *must state that such distinctions seldom (indeed, in point of fact, never) are rational.*[25] *Otherwise---and as*

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[24] Quasi-suspect classification, and hence intermediate scrutiny, also has been accorded to illegitimacy. *Lalli v. Lalli*, 439 U.S. 259, 265 (1978).

[25] In 1976, this Court first announced that laws making distinctions based on sex would be judged by intermediate, or heightened, scrutiny. Such a classification cannot withstand constitutional challenge unless it "is substantially related to the achievement of an important governmental objective." *Craig v. Boren*, 429 U.S. 190, 197 (1976). Since *Craig*, this Court consistently has used the intermediate standard of review for sex-based classifications, applying it or explaining it in at least 17 different decisions in the past 20 years. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. ___ (1994); *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 459 (1988); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-724, & n.9 (1982); *Plyer v. Doe*, 457 U.S. 202, 217 n.16 (1982); *Mills v. Habluetzel*, 456 U.S. 91, 101, & n.8 (91982); *Rostker v. Goldberg*, 453 U.S. 57, 87

demonstrated in the instant case---the expanded role of the judiciary in reviewing those policy choices plainly is unwarranted.[26]

II. The impact of strict scrutiny on presently settled questions of federal law counsels strongly against eliminating the well-established standard of intermediate scrutiny.

As demonstrated above, the enormity of the question the Government puts to the Court is too great to be disposed of in a footnote hailing judicial deference to considered military judgment. Moreover, the enormity of the question is too great to be addressed without considering its judicial and public policy consequences well beyond the impact of strict scrutiny for sex-based classifications on the armed forces.

By asking this Court to declare sex is a suspect classification, it is not too strong to state that the Government urges the addition of an Equal Rights Amendment to the Constitution by judicial fiat. The need for an Equal Rights Amendment, however, has been asked and answered, in the forum for such questions designated by the Constitution, and

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(1981); *Kirchberg v. Feenstra*, 450 U.S. 455, 459 (1981); *Wengler v. Druggists Mutual Ins. Co.*, 466 U.S. 142, 150 (1980); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 286 (1979); *Davis v. Passman*, 442 U.S. 228, 234 (1979); *Califano v. Westcott*, 443 U.S. 76, 85 (1979); *Caban v. Mohammed*, 441 U.S. 380, 388 (1979); *Orr v. Orr*, 440 U.S. 268, 279 (1979); *Califano v. Webster*, 430 U.S. 313, 316-317 (1977); and, *Califano v. Goldfarb*, 430 U.S. 199, 210-211 (1977).

[26] To highlight the different (and, heretofore, legally cognizable) considerations that underlie classifications based on sex, one need only substitute a racial minority for women in existing policy choices. *See, e.g.*, policy choices set out at notes 8, 10-21 and accompanying text.

the nation's answer, at least for now, was "no." The nation debated that issue during the 1970's and early 1980's, and decided not to ratify the proposed Equal Rights Amendment (ERA) to the Constitution.[27]

During that time, many states adopted state constitutional versions of the ERA proposed for the federal constitution. The experiences of the 17 state ERAs give some indication of what might happen if this Court declared sex a suspect class.[28]

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[27] Congress proposed the ERA to the states on March 22, 1972. State legislatures quickly ratified the amendment, but the ratification effort soon ground to a halt. By the end of February 1974, 33 of the necessary 38 states had ratified the ERA. Only one state ratified the ERA in 1975, none did in 1976, and the last state to ratify the ERA, Indiana, did so in January 1977. Congress extended the ERA's deadline for ratification from March 22, 1979 until June 30, 1982. No states ratified the ERA during that time. During the original seven year deadline, five states that had ratified the ERA rescinded their ratifications (Idaho, Kentucky, Nebraska, South Dakota and Tennessee). The states of Idaho and Arizona filed suit in federal court in Idaho, seeking a declaration that states had the power to rescind their ratification of proposed amendments, and that Congress lacked the authority to extend the ratification deadline. The federal district court ruled the rescissions were valid and that Congress had no power to extend the deadline. *Idaho v. Freeman*, 529 F.Supp. 1107 (D.Idaho 1981). This Court dismissed the appeal as moot. *NOW v. Idaho*, 459 U.S. 809 (1982).

[28] The seventeen states with ERAs in their state constitutions are Alaska, Art. I, §3 (1972); Colorado, Art. 2, §29 (1972); Connecticut (Art. I, §20 (1974); Hawaii, Art. I, §3 (1972); Illinois, Art. I, §18 (1971); Louisiana, Art. I, §3 (1974); Maryland, Art. 46 (1972); Massachusetts, Part I, Art. 1 (1976); Montana, Art. 2, §4 (1973); New Hampshire, Part I, Art. 2 (1975); New Mexico, Art. II, §18 (1973); Pennsylvania, Art. I, §28 (1971); Texas, Art. I, §3a (1972); Utah, Art. 4, §1 (1896); Virginia, Art. I, §11 (1971); Washington, Art. 31, §1 (1972) and Wyoming, Art. I, §3 (1896). No state has added an ERA to its state constitution since 1976.

Family Law

Family law has been the greatest area of litigation under the state ERAs.[29] Ironically, the typical ERA family law case consisted of a man challenging a law that made a sex-based obligation on men to provide for women (e.g., fathers must support their families, divorced fathers must pay child support or alimony to their families, etc.).[30] The American Law Reports commented on this phenomenon, saying:

> In application, however, men often seem to have benefited more than women from the state ERA provisions, especially as concerns family matters. This has resulted in women losing some of the special protections they previously enjoyed.[31]

For example, a Maryland law that made it a crime for a husband not to support his wife was declared unconstitutional under the state ERA. The court ruled that such sex-based legal distinctions were now prohibited.[32] Child support becomes a joint responsibility of both parents, not just the

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[29] *See* 90 A.L.R.3d 158, "*Construction and Application of State Equal Rights Amendments Forbidding the Determination of Rights Based on Sex.*"

[30] *See "Equal Rights Provisions: The Experience Under State Constitutions,"* 65 Calif. L.R. 1086, 1106-7 (1977).

[31] 90 A.L.R.3d at 168.

[32] *Coleman v. Maryland,* 37 Md.App. 322, 377 A.2d 553 (1977).

fathers, under various state ERA cases.[33] The state legislatures have responded by passing new versions of these laws that are sex-neutral.

Employment Discrimination Against Women

State ERAs have not been used much to battle employment discrimination against women because of the state action issue. Because private employers are not part of the government, the state ERA does not affect their employment practices. Generally, women use federal and state civil rights statutes to bring employment discrimination claims, not state ERAs.

The Equal Protection Clause has the same state action requirement. "[T]he guarantees of free speech and equal protection guard only against encroachment by the government and 'erec[t] no shield against merely private conduct." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, ___ U.S. ___, 132 L.Ed.2d 487, 499 (1995), quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). Therefore, if this Court interprets the Equal Protection Clause to protect sex as a suspect class, that decision will only affect employment issues in the context of government employees, not private businesses.[34]

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[33] *Conway v. Dana*, 456 Pa. 536, 318 A.2d 324 (1974); *Cooper v. Cooper*, 513 S.W.2d 229 (Tex.Civ.App. 1974) and *Kemp v. Kemp*, 287 Md. 165, 411 A.2d 1028 (1980).

[34] In one of the few employment discrimination cases brought under a state ERA, a Texas court upheld a city ordinance that set up separate jobs named "policeman" and "policewoman," because the duties of the two jobs were different. *Turner v. City of Baytown*, 516 S.W.2d 270 (Tex.Civ.App. 1974).

Girls' Athletics

The state ERA cases concerning high school girls' athletics show the same philosophical dilemmas involved in accommodating women in the armed forces. Does one advocate total integration of boys and girls on athletic teams, to promote full equality? Or does one recognize that girls in general do not have the same physical abilities of boys, so girls and boys should have separate teams, so that girls will not be sitting on the bench while boys play in the first string positions on integrated teams? Also, does the constitutional standard apply differently to contact sports than non-contact sports? Does it promote equality to have a boy wrestling on a mat with a girl?

The state courts have come down on both sides of these questions. The Massachusetts Supreme Judicial Court ruled unconstitutional female-only teams, because the state ERA demands total equality.[35] An Illinois court upheld female-only teams, saying that women needed separate athletic teams in order to have actual equality of athletic opportunity.[36] These matters could become federal constitutional questions if this Court declares sex to be a suspect class.

Homosexual Marriage

The Hawaii Supreme Court used its state ERA to apply strict scrutiny to the state marriage laws, ruling that the state must demonstrate at trial a compelling state interest to justify

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[35] *Attorney General v. Massachusetts Interscholastic Athletic Association*, 393 N.E.2d 284 (Mass. 1979)

[36] *Petrie v. Illinois State High School Association*, 75 Ill.App.3d 980, 394 N.E.2d 855 (1979).

its requirement that only one man and one woman can marry. In *Baehr v. Lewin*, 74 Hawaii 645, 852 P.2d 44 (1993), the Hawaii Supreme Court applied the state ERA, which it said is "substantially identical with the proposed Equal Rights Amendment of the United States Constitution," *Baehr*, 852 P.2d at 65. That court ruled that the Hawaii marriage statute contained a sex-based classification, because a man is legally disabled from marrying another man because of his sex. The Hawaii Supreme Court drew a parallel between sex and race, and pointed to Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967). If the state cannot limit who can get married due to their race, and race is a suspect class, then the state cannot limit who can get married because of their sex, because sex is a suspect class under the state ERA. *Baehr*, 852 P.2d at 61-63. In the eyes of the Hawaii Supreme Court, to prohibit same-sex marriages is the constitutional equivalent of banning interracial marriages.

The Hawaii Supreme Court reviewed a decision by the Washington Court of Appeals rejecting the argument that the Washington state marriage law contained sex classifications that violated the state ERA, preventing two homosexual males from getting married. The two homosexual men had challenged the state marriage law that limited marriage to opposite sex partners and argued that the law violated the state ERA. The Washington Court of Appeals rejected that argument, saying that two men or two women could not meet the basic definition of marriage as one man and one woman. *See Singer v. Hara,* 11 Wash.App. 247, 522 P.2d 1187 (1974). The Hawaii Supreme Court criticized this reasoning as "tortured and conclusory sophistry." *Baehr*, 852 P.2d at 63.

The Hawaii Supreme Court remanded the case for trial to see if the state could demonstrate a compelling state interest

in limiting marriage to opposite-sex partners. The Hawaii Supreme Court said:

> On remand, in accordance with the "strict scrutiny" standard, the burden will rest on [the state] to overcome the presumption that [the Hawaii marriage statute] is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights.

Baehr, 852 P.2d at 68. Commentators have clamored to support the idea that laws limiting marriage to one man and one woman are an unconstitutional sex-based classification, deserving review under strict scrutiny.[37] If this Court declares sex to be a suspect class under the Equal Protection Clause, there could be federal constitutional challenges to the other 49 state laws that limit marriage to one man and one woman.

Abortion and Abortion Funding

This Court could inadvertently reopen the abortion issue by declaring sex to be a suspect class. Although this Court said there is no constitutional right to government funding of abortions in such cases as *Maher v. Roe*, 432 U.S. 464 (1977)

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[37] *See, e.g., "Same-Sex Marriage,"* 10 New York Law School Journal 555 (Spring, 1993); *"The Legality of Homosexual Marriage,"* 82 Yale L.J. 573, 588 (1973); *"The Texas Equal Rights Amendment in the Courts, 1972-77: A Review and Proposed Principles of Interpretation,"* 15 Houston L.R. 537, 628 (1978); *"Marriage Rights: Homosexuals and Transsexuals,"* 8 Akron L.R. 369, 373 (1975); *"Same Sex Marriages and the Constitution,"* 6 U.C.-Davis L.R. 275, 292 (1973) and *"The State Equal Rights Amendments and Their Impact on Domestic Relations Law,"* 11 Family Law Quarterly 101, 115 (1977).

and *Harris v. McRae*, 448 U.S. 297 (1980), this contentious issue might very well return to federal court because litigants in various states have argued that their states' ERAs compel government funding of abortions.

In *Doe v. Maher*, 515 A.2d 134 (Conn.Super. 1986), a Connecticut court ordered state funding of Medicaid abortions because of the state ERA. Because only women can get pregnant and have abortions, the court reasoned, then it violates the state ERA not to fund their abortions:

> Since only women become pregnant, discrimination against pregnancy by not funding abortion when it is medically necessary and when all other medical expenses are paid by the state for both men and women is sex oriented discrimination.

Maher, 515 A.2d at 159. The Connecticut court ruled that the state ERA required the law to be examined by "strict scrutiny." This is the standard the Solicitor General urges this Court to adopt.[38]

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[38] Pennsylvania courts also addressed the issue of whether the state ERA mandates government funding of abortions for poor women. An intermediate appellate judge ruled that the ERA did indeed require state funding of abortions. *Fischer v. Department of Public Welfare*, 482 A.2d 1137 (Pa.Cmwlth. 1984). The full appellate court reversed, *Fischer v. Department of Public Welfare*, 482 A.2d 1148 (Pa.Cmwlth. 1984). The Pennsylvania Supreme Court agreed that the state ERA does not mandate government funding. *Fischer v. Department of Public Welfare*, 509 Pa. 293, 502 A.2d 114 (1984).

Additionally, the Massachusetts Supreme Judicial Court ruled that the state government must pay for abortions for poor women. *Moe v. Secretary of Administration*, 382 Mass. 629, 417 N.E.2d 387 (1981). Although the plaintiffs argued that the state ERA required the state to pay

Commentators have sounded a similar theme by urging this Court to declare sex a suspect class, and then root the right to abortion in the Equal Protection Clause, rather than the right to privacy. For example, one commentator said:

> *Roe v. Wade* and *Doe v. Bolton*, the 1973 abortion decisions, for example, barely mention women's rights. They are not tied to equal protection or equal rights theory.... A broader frame for these decisions might have made it more difficult for the Court to rule, as it did stunningly in June 1977, that neither the Constitution nor federal statute requires Medicaid reimbursement for elective abortions.

Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 14 Women's Rights Law Reporter 361, 362 (Spring/Fall 1992).

Plainly, this Court will be forced to revisit the abortion funding decisions if this Court declares sex to be a suspect class. This Court may also be opening up the entire abortion controversy again and jeopardizing this Court's decision in *Planned Parenthood v. Casey*, ___ U.S. ___, 120 L.Ed.2d 674 (1992). In that case, this Court said state regulations on abortion are unconstitutional only if they impose an "undue burden" on that right. *Casey*, 120 L.Ed.2d at 715. The joint opinion of O'Connor, Kennedy and Souter then upheld many provisions of the law, such as the informed consent provision,

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for abortions, the Massachusetts high court declined to rule on the ERA argument and instead granted relief under another provision of the state constitution. 417 N.E.2d at 397.

the parental consent portion and the 24-hour waiting period for obtaining an abortion. *Casey*, 120 L.Ed.2d at 716-730.

But all of this could be reopened if the Court declares sex to be a suspect class. As Justice Blackmun said in his opinion in *Casey:*

> Our precedents and the joint opinion's principles require us to subject all non-de minimis abortion regulations to strict scrutiny. Under this standard, the Pennsylvania statute's provisions requiring content-based counseling, a 24-hour delay, informed parental consent, and reporting of abortion-related information must be invalidated.

Casey, 120 L.Ed.2d at 747. The only way to avoid reopening the abortion issue is for the Court to refuse to rule that sex is a suspect class.

CONCLUSION

This Court should not depart from the well-established standard of intermediate scrutiny to decide this case for VMI.

Date: December 15, 1995

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APPENDIX

Appendix

List of Amici Curiae

The Center for Military Readiness (CMR) - The Center for Military Readiness is a 501(c)(3) public policy organization specializing in military personnel issues. CMR supporters in all fifty states and on military bases around the world include approximately equal numbers of active duty and retired military people of all ranks and branches of the service, plus civilians who advocate a strong national defense and sound personnel policies that enhance morale, unit strength and overall readiness.

Family Research Council - Family Research Council is an independent, non-profit advocacy group dedicated to ensuring that the interests of the family are considered and respected in the formation of public policy. In 1995, the Family Research Council organized the Military Readiness Project, to participate in decisions made about the military, because the armed forces play an influential role in our national life. Family Research Council was founded in 1981 and is headquartered in Washington, D.C.

Minnesota Family Council - The Minnesota Family Council is Minnesota's largest nonprofit, nonpartisan, profamily organization. Established in 1983, the Minnesota Family Council addresses a wide array of issues affecting the family though the media, the legislative and legal system and by a statewide newspaper called the Profamily News. The Minnesota Family Council is based in Minneapolis.

Concerned Women for America - Concerned Women for America is national, nonprofit organization representing approximately 600,000 people. The purpose of CWA is to

preserve, protect, and promote traditional and Judeo-Christian values through education, legal defense, legislative programs, humanitarian aid and related activities. CWA was founded in 1979 and is headquartered in Washington, D.C.

Madison Project - The Madison Project is a membership organization designed to promote conservative public policy, and the election of social and economic conservatives to public office. The organization is named after James Madison who was not only a great Virginian, but authored the Constitution in the spirit of individual freedom and limited government. The Madison Project will focus on Constitutional liberty, traditional values and economic common sense, and will work to recruit candidates, train grassroots workers, and promote public policy consistent with those views. The Madison Project is based in Purcellville, Virginia.

Eagle Forum - Eagle Forum is a conservative, profamily organization of volunteers engaged in public policy making. We have chapters in all 50 states and are concerned particularly with legislation and policies affecting the family and gender relationships. Eagle Forum is based in Alton, Illinois.

Free Congress Foundation -- Free Congress Foundation is a non-profit foundation that seeks to advance fundamental principles of judicial restraint and the rule of law. Among these is consistent application of traditional rules of constitutional interpretation. The proper role for courts is settlement of legal disputes by faithful application of the law to the facts of particular cases. Only then can social policy develop as it should. Free Congress Foundation is based in Washington, D.C.

Northstar Legal Center -- The Northstar Legal Center is a division of the Minnesota Family Council. Its mission is to promote traditional values and constitutional freedoms in the legal arena. The Northstar Legal Center is based in Minneapolis.

No. 94-2107

Supreme Court, U.S.
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DEC 15 1995
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,

Petitioner,

vs.

COMMONWEALTH OF VIRGINIA, *et al.*,

Respondents.

COMMONWEALTH OF VIRGINIA, *et al.*,

Cross-Petitioners,

vs.

UNITED STATES OF AMERICA,

Cross-Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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December 15, 1995

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	i
INTEREST OF AMICUS	1
INTRODUCTION	2
ARGUMENT	
VMI'S MEN-ONLY ADMISSIONS POLICY VIOLATES THE CONSTITUTION'S GUARANTEE OF EQUAL PROTECTION	4
A. The Constitution Guarantees All Persons Equal Protection Under the Law	5
B. VMI Does Not Establish a Legitimate and Important State Interest That Justifies Excluding Women	6
C. VMI Does Not Show a Substantial and Direct Relationship Between Its Purported State Interests and Its Exclusion of Women	8
D. VMI Impermissibly Seeks to Deny All Women Equal Access to the Tangible and Intangible Benefits of an Established State School	11
CONCLUSION	13

PAGE

TABLE OF AUTHORITIES

Cases

Alexander v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969) 2

Brown v. *Board. of Educ.*, 347 U.S. 483 (1954) 3
Board of Educ. v. *Dowell*, 498 U.S. 237 (1991) 2
Board of Educ. v. *Harris*, 444 U.S. 130 (1979) 2
Bob Jones Univ. v. *United States*, 461 U.S. 574 (1983). . 2

Craig v. *Boren*, 429 U.S. 190 (1976) 9

Freeman v. *Pitts*, 503 U.S. 467 (1992) 2
Frontiero v. *Richardson*, 411 U.S. 677 (1973) 2,9

Grove City College v. *Bell*, 465 U.S. 555 (1984) 2

J.E.B. v. *Alabama ex rel. T.B.*, 114 S. Ct. 1419 (1994). . 6,8

Kirchberg v. *Feenstra*, 450 U.S. 455 (1981) 9
Kirwan v. *Podberesky*, *cert. denied*, 115 S. Ct. 2001 (1995) 2

McLaurin v. *Oklahoma State Regents*, 339 U.S. 637 (1950) 3,5,11,12
Metro Broadcasting, Inc. v. *FCC*, 497 U.S. 547 (1990) 6
Mississippi Univ. for Women v. *Hogan*, 458 U.S. 718 (1982) 3,4,5,6,8
Missouri v. *Jenkins*, 495 U.S. 33 (1990). 2
Missouri v. *Jenkins*, 115 S. Ct. 2038 (1995). 2
Muller v. *Oregon*, 208 U.S. 412 (1908) 10

Orr v. *Orr*, 440 U.S. 268 (1979) 9

Reed v. *Reed*, 404 U.S. 71 (1971) 8

PAGE

Stanton v. *Stanton*, 421 U.S. 7 (1975) 9
Sweatt v. *Painter*, 339 U.S. 629 (1950) 3,4,5,11,12

United States v. *Virginia*, 44 F.3d 1229 (4th Cir.) *cert. granted* 116 S. Ct. 281 (1995) ("*VMI IV*") 6,8,11,12
United States v. *Virginia*, 766 F. Supp. 1407 (W.D. Va. 1991) *vacated by 976 F. 2d 890 (4th Cir. 1992)* ("*VMI I*") 3,7,9,10
United States v. *Virginia*, 852 F. Supp. 471 (W.D. Va. 1994) *aff'd 44 F. 3d 1229 (4th Cir. 1995)* ("*VMI III*") 12
United States v. *Virginia*, 976 F.2d 890 (4th Cir. 1992) *cert. denied* 113 S. Ct. 2431 (1993) ("*VMI II*") 7,9,10,11

Weinberger v. *Wiesenfeld*, 420 U.S. 636 (1975) 8
Wengler v. *Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980) 8

Constitution and Statutes

U.S. CONST. Amend. XIV 5
10 U.S.C. § 4342 Note (Supp. 1995) 10
10 U.S.C. § 4352 (1959) 7
10 U.S.C. § 6964 Note (1959 and Supp. 1995) 7
10 U.S.C. § 9352 (1959) 7
14 U.S.C. § 182(a) (1990) 10
46 C.F.R. Pt. 310 (1993) 10

Sup. Ct. R. 37.2 2

No. 94-2107

IN THE

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October Term, 1995

UNITED STATES OF AMERICA,

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Cross-Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

INTEREST OF AMICUS

The Lawyers' Committee for Civil Rights Under Law (the "Lawyers' Committee") is a nonprofit organization established in 1963 at the request of President Kennedy to marshall the involvement of private lawyers in a national effort to ensure civil rights and equal protection to all Americans. The Lawyers' Committee has enlisted the services of thousands of members of the private bar in cases involving discrimination in, primarily, education, employment, voting and housing.

The Lawyers' Committee has a long history of participation in equal educational opportunity and school desegregation cases before this Court[1] and in the lower courts. *Amicus* submits that its experience in obtaining relief for educational inequalities at the elementary, secondary and higher education levels enables it to provide a perspective different from the parties and other *amici* on the issues before this Court. *Amicus* also maintains a profound interest in the development of sound precedent regarding the means of desegregating this nation's public institutions and eliminating the effects of discrimination.

The written consents of the parties to the submission of this brief have been lodged with the Clerk pursuant to Rule 37.2.

INTRODUCTION

The Virginia Military Institute ("VMI") was founded one hundred and fifty six years ago, in 1839, at a time when women in this country were prohibited from voting, practicing law, holding political office, and serving in the United States military. *See Frontiero* v. *Richardson*, 411 U.S. 677, 685 (1973). At the time of VMI's founding, African Americans were in slavery.

Born of its age, VMI made its mission the education of "citizen-soldiers," characterized as "educated and honorable men who are suited for leadership in civilian life and who can

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1. *See, e.g.*, amicus briefs submitted in *Missouri* v. *Jenkins*, 115 S. Ct. 2038 (1995); *Kirwan* v. *Podberesky, cert. denied*, 115 S. Ct. 2001 (1995); *Freeman* v. *Pitts*, 503 U.S. 467 (1992); *Board of Educ.* v. *Dowell*, 498 U.S. 237 (1991); *Missouri* v. *Jenkins*, 495 U.S. 33 (1990); *Grove City College* v. *Bell*, 465 U.S. 555 (1984); *Bob Jones Univ.* v. *United States*, 461 U.S. 574 (1983); *Board of Educ.* v. *Harris*, 444 U.S. 130 (1979); *Alexander* v. *Holmes County Bd. of Educ.*, 396 U.S. 19 (1969).

provide military leadership when necessary." *United States* v. *Virginia*, 766 F. Supp. 1407, 1425 (W.D. Va. 1991), *vacated by* 976 F.2d 890 (4th Cir. 1992) (hereafter, "*VMI I*"). VMI would admit neither women nor African Americans for such training.

One hundred twenty-nine years later, in 1968, well after this Court's decisions in *McLaurin* v. *Oklahoma State Regents*, 399 U.S. 637 (1950), *Sweatt* v. *Painter*, 339 U.S. 629 (1950), and *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954) (barring racial discrimination in schools), VMI finally opened its admissions to African-American men. In 1995, VMI still refuses to admit women and the Commonwealth of Virginia instead seeks to create a separate and unequal institution for them.

Consistent with its mission, the Lawyers' Committee urges this Court to reject VMI's asserted "state interests" and its stereotyped, class-based reasoning for excluding *all* women from VMI regardless of individual ability. The Lawyers' Committee urges this Court to affirm the Fourth Circuit's judgment of VMI's liability for operating an all-male institution but on broader grounds than those relied on below.

Amicus submits that the analysis of the Court of Appeals was insufficient because it failed to demand an "exceedingly persuasive justification" for excluding women from the unique educational opportunities offered by VMI. It likewise failed to demand that VMI's sex-based admissions policy be demonstrated to be "substantially related to the achievement" of such a justification, a deficiency which inexorably led it to approve an unconstitutional "remedy" which would provide for a separate and unequal educational institution for women. *See Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 (1982).

If the Fourth Circuit had properly scrutinized VMI's men-only admissions policy—as required by this Court's decisions—it would have ordered, as the only suitable remedy, VMI's admission of qualified women. That same result may be obtained by reversing the Fourth Circuit on the Petition filed by the United States.

Today, both men and women serve in the military and in leadership roles. Pursuant to their right to the equal protection of the laws, women should have equal access to the unique reputation, prestige, alumni network and tangible and intangible benefits of VMI's cadet training. *Cf. Sweatt*, 339 U.S. at 637.

ARGUMENT

VMI'S MEN-ONLY ADMISSIONS POLICY VIOLATES THE CONSTITUTION'S GUARANTEE OF EQUAL PROTECTION

The Equal Protection Clause requires a court to answer two questions regarding a challenged policy: (1) whether there is a legitimate and important state interest served by the challenged policy; and (2) whether the challenged policy is substantially related to the achievement of that legitimate state interest. *Hogan*, 458 U.S. at 724-25.

While the court below was faced with a clear violation of equal protection, it mistakenly accepted as a legitimate interest sex-segregated education for its own sake. The court thus confused the question at issue—the propriety of the policy of sex-segregated education in this setting—with the legitimate and important state interest the policy is claimed to serve. The court then compounded its confusion by failing to determine whether the policy of sex-segregated education was substantially related to the achievement of a legitimate state interest. Instead, the court merely sought to justify the

admissions policy on the basis of pedagogical techniques such as adversative training, physical training standards, stress, and distraction, related to class-based assumptions about the sexes.

Rather than employ a "searching analysis," the court below accepted class-based stereotypes to justify both the end and the means. Departing from established equal protection analysis, the court failed to examine the assumptions behind VMI's pedagogy. This permitted the lower court mistakenly to conclude that a proper remedy could include "parallel institutions or parallel programs" which could depart from equality. Its opinion thus departs from the holdings of this Court that the Equal Protection Clause is violated when public education is separate and unequal. *See, e.g., Sweatt*, 339 U.S. 629; *McLaurin*, 339 U.S. 637.

It is only by admitting women that VMI's archaic discriminatory policies can be remedied.

A. The Constitution Guarantees All Persons Equal Protection under the Law.

The Constitution's Fourteenth Amendment guarantees all individuals — men and women — equal protection under the law. To withstand equal protection scrutiny, a sex-based classification must be shown: (1) to serve a legitimate and important governmental objective; and (2) to be substantially related to the achievement of that objective. *Hogan*, 458 U.S. at 724-25. This equal protection test is to be applied "free of fixed notions concerning the roles and abilities of males and females." *Id.* at 724-725.

The Fourteenth Amendment protects the rights of persons *as individuals* and the state may not abridge those individual constitutional rights based on generalizations about group identifications such as race or gender. As this Court instructs,

the "Equal Protection Clause . . . acknowledges that a shred of truth may be contained in some stereotypes, but *requires that state actors look beyond the surface* before making judgments about people that are likely to stigmatize as well as to perpetuate historical patterns of discrimination." *J.E.B.* v. *Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1427, n.11 (1994) (declaring unconstitutional peremptory juror challenges based on gender) (emphasis added); *id.* at 1434 ("'At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual . . . class.'") (Kennedy, J., concurring) (quoting *Metro Broadcasting, Inc.* v. *FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (internal quotation marks omitted)).

B. VMI Does Not Establish a Legitimate and Important State Interest That Justifies Excluding Women

The Court must employ a "searching analysis" of asserted state objectives to determine whether an important state interest exists which justifies a sex-based classification. *See Hogan*, 458 U.S. at 728. As this Court cautions, "[h]istory provides numerous examples of legislative attempts to exclude women from particular areas simply because legislators believed women were less able than men to perform a particular function." *Hogan*, 458 U.S. at 725 n.10. But rather than employ a "searching analysis," the Fourth Circuit applied a "cautious approach" which accorded "deference" to an asserted interest in single-sex education and approved it "so long as the purpose is not pernicious and does not violate traditional notions of the role of government." *United States* v. *Virginia*, 44 F.3d 1229, 1236-37 (4th Cir.), *cert. granted* 116 S. Ct. 281 (1995), (hereafter "*VMI IV*"). By failing searchingly to scrutinize the purported state objectives, the Fourth Circuit erred in its constitutional analysis.

Long after its origins, VMI claims that its men-only admissions policy is justified by a state interest in single-sex education as one of a variety of educational opportunities. Cross-Pet'r. Br. at 24-27. Notwithstanding the lower court's "deference" to the state legislature, it questioned the importance of such an objective in serving the interest of educational diversity. The court found: "[i]f VMI's male-only admissions policy is in furtherance of a state policy of 'diversity,' the explanation of how the policy is furthered by affording a unique educational benefit only to males is lacking. A policy of diversity which aims to provide an array of educational opportunities, including single-gender institutions, must do more than favor one gender." *United States* v. *Virginia*, 976 F.2d 890, 898 (4th Cir. 1992), *cert. denied* 113 S. Ct. 2431 (1993) (hereafter "*VMI II*"); *see also VMI I*, 766 F. Supp. 1407, 1420. The Court of Appeals found unconstitutional Virginia's maintenance of only an all-male single-gender institution. *VMI II*, 976 F.2d at 899.

VMI also claimed that its men-only admissions policy advances a state interest in the so-called "adversative" teaching method. *See* Cross-Pet'r. Br at 33-36. Yet nowhere does the Court of Appeals question why the "adversative" method in itself would constitute a legitimate and important state objective. The method is outlawed in 30 states. *See* Bruce Smith, *Watchdog Says Campus Harassment by Upperclassmen Has Declined*, Associated Press, Oct. 21, 1991, *available in* LEXIS, News Library, Wires. None of the federal military academies allow it. *See* 10 U.S.C. § 4352 (1959) (outlawing hazing in U.S. Military Academy); 10 U.S.C. § 6964 (1959 and Supp. 1995) (same for U.S. Navel Academy); 10 U.S.C. § 9352 (1959) (same for U.S. Air Force Academy). The adversative method — said by VMI to be more important than the rights of individual women — is based on instructing cadets to treat entering students like rats as "the rat is 'probably the lowest animal on earth.'" *VMI I*, 766 F. Supp. at 1422 (citation omitted).

Contrary to the approach taken by the Court of Appeals, courts must weigh purported state objectives to see that they are sufficiently compelling. *Hogan*, 458 U.S. at 724. *See, e.g., Wengler* v. *Druggists Mut. Ins. Co.*, 446 U.S. 142, 152 (1980) (rejecting claimed objective of administrative convenience as insufficiently weighty to justify discriminatory granting of widow's death benefits); *Reed* v. *Reed*, 404 U.S. 71, 76-77 (1971) (rejecting administrative efficiency as reason to exclude women from serving as estate administrators). Instead, the court simply accepted VMI's pedagogical justifications, especially the adversative method, and concluded that it "would not be effective for women as a group . . ." *See VMI IV*, 44 F.3d at 1233. Were it allowed, such uncritical deference to asserted pedagogical interests would permit states to justify a range of discriminatory classifications by merely asserting that such discrimination had educational benefits, however tenuous and class-oriented.

C. VMI Does Not Show A Substantial and Direct Relationship Between Its Purported State Interests and Its Exclusion of Women

The lower court failed to identify an important and legitimate state interest to which single-sex education was directed and instead sought to justify single-sex education by relying upon gender stereotypes. It did so notwithstanding the decisions of this Court that individuals *cannot* be denied equal protection on the basis of class stereotypes. *See, e.g., Weinberger* v. *Wiesenfeld*, 420 U.S., 636, 645 (1975) (gender-based generalizations "cannot suffice to justify the denigration of the [individual] efforts of women. . .").

Sex-based classifications by state actors cannot "serv[e] to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." *J.E.B.*, 114 S. Ct. at 1422. Since "sex, like race and national origin, is an immutable characteristic determined solely by the

accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate '*the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . .*'" *Frontiero*, 411 U.S. at 686 (plurality opinion) (citation omitted) (emphasis added)). *See also Craig* v. *Boren*, 429 U.S. 190, 209 (1976) (striking down gender-specific drinking ages as relying on "loose-fitting generalities" of the genders); *Orr* v. *Orr*, 440 U.S. 268, 283 (1979) (striking down statutory scheme whereby only husbands may be required to pay alimony as "carr[ying] with it the baggage of sexual stereotypes"); *Stanton* v. *Stanton*, 421 U.S. 7, 15 (1975) (striking down gender-specific ages of majority as reflecting societal "role-typing"); *Kirchberg* v. *Feenstra*, 450 U.S. 455 (1981) (holding unconstitutional statute granting only husbands the right to manage or dispose of jointly owned property without consent).

Ignoring these precedents, VMI attempts to justify its men-only admissions policy by asserting that since *some* women cannot meet the current physical training requirements, *all* women should be excluded from VMI. *VMI II*, 976 F.2d at 896.

Such an argument is constitutionally unacceptable because the record shows that 15% of women *could* successfully meet VMI's current physical fitness requirements. *See VMI I*, 766 F. Supp. at 1438. Indeed, the Fourth Circuit noted that the parties agreed that "some women can meet the physical standard." *VMI II*, 976 F.2d at 896. Notwithstanding this, the court proceeded to group all women together — including those who could meet the physical fitness requirements — and conclude that "dual-track" physical training was required. *Id.* In doing so, the court also ignored the record that 50% of new male cadets at VMI fail the physical fitness requirements and need remedial training. *See* Pet'r. Brief at 31. It ignored too the evidence that West Point successfully uses sex-neutral

ability groups during basic training. *See VMI I*, 766 F. Supp. at 1437.

VMI attempts to justify its all-male admissions policy by claiming that the presence of women would tend "to distract" male students from their studies. *VMI I*, 766 F. Supp. at 1412, 1440. The Fourth Circuit credits this "stress" argument and elevates it to a "cross-sexual confrontation." *VMI II*, 976 F.2d at 896. But the Fourth Circuit fails to explain how a man's interest in being free from distraction is greater than a woman's constitutional claim to equal protection of the laws. Cases such as those of an earlier era, which gave constitutional weight to "the passion of man," *see, e.g., Muller* v. *Oregon*, 208 U.S. 412, 422 (1908), could not possibly survive constitutional scrutiny today.

VMI claims that the admission of women would "destroy" VMI. Cross-Pet'r. Br. at 35-36; *VMI II*, 976 F.2d at 897. This claim ignores the fact that women attend military colleges throughout this country with notable success. *See* Pet'r. Brief at 32 n. 19 (women are admitted to the federal military, naval and air force academies, the Coast Guard and the Merchant Marines (citing 10 U.S.C. § 4342 note; 14 U.S.C. § 182(a); and 46 C.F.R. Pt. 310)). Indeed, the district court found that the admission of women "did not significantly change" West Point or the Naval Academy, *VMI I*, 766 F. Supp. at 1428-29, and that "VMI graduates will 'probably be considered disadvantaged in the coed Army' because they do *not* come from a coed environment." *Id.* at 1428 (citation omitted) (emphasis added).

Women participate fully in the modern military and in civilian leadership roles. Nowhere in the record is there evidence to support VMI's threatened extinction should women arrive and be trained there as leaders alongside male cadets.

D. VMI Impermissibly Seeks to Deny All Women Equal Access to the Tangible and Intangible Benefits of an Established State School

Having found VMI's exclusionary policies unconstitutional, the Fourth Circuit devised its own remedy — separate but "substantively comparable" facilities. *VMI II*, 976 F.2d at 900. According to the Court, separate institutions would have to provide "substantively comparable benefits." *VMI IV*, 44 F.3d at 1240. By its very nature, this separate but "substantively comparable" test is predicated on class-based reasoning that women require a separate school better suited to their characteristics as a class.

In stark contrast to the Court of Appeals' discrimination analysis, this Court remedies racial discrimination in public education by ordering equality of opportunity, not segregation. *See, e.g., Sweatt*, 339 U.S. 629; *McLaurin*, 339 U.S. 637. In *Sweatt*, the Court ordered an all-white state law school to admit an African-American law student notwithstanding the fact that a separate African-American law school was being formed. The Court found that the existing state law school "possesses to a far greater degree" those qualities such as "reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige" than did the newly created school. *Sweatt*, 339 U.S. at 633-34. In so finding, this Court flatly rejected the segregationist argument that "the furnishing of equal facilities at separate schools is best for both races and is necessary to preserve the public peace and welfare . . . ." Brief for Respondents in *Sweatt* at 78; *see also McLaurin* 339 U.S. at 641 (declaring unconstitutional seating restrictions of African-American student in state graduate school).

It is unnecessary to decide whether the principle of separate as inherently unequal applies to single-sex public educations because here VMI's exclusion of women calls indisputably for separate and *unequal* treatment. The proposed VWIL program for women offers fewer degrees, different courses, a different method of teaching, no alumni network, no prestige, no history, and no great reputation associated with it. As the district court found, "even if all else were equal between VMI and [VWIL], the VWIL program cannot supply those intangible qualities of history, reputation, tradition and prestige that VMI has amassed over the years." *United States* v. *Virginia*, 852 F. Supp. 471, (W.D. Va. 1994), *aff'd* 44 F.3d 1229 (4th Cir. 1995) ("*VMI III*") (footnote omitted); *VMI IV*, 44 F.3d at 1241.

Following its decisions in *Sweatt* and *McLaurin*, this Court should declare unconstitutional VMI's continual exclusion of women from its tangible and intangible educational benefits. As this Court instructs in the context of racial segregation: "[t]he removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving [an individual] of the opportunity to secure acceptance by [his/her] fellow students on [his/her] own merits." *McLaurin*, 339 U.S. at 641-4.

CONCLUSION

For all the reasons stated above, this Court should hold that VMI's policy of excluding women violates the Equal Protection Clause.

Respectfully submitted,

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Nos. 94-1941 and 94-2107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA, *et al.*,
Respondents.

COMMONWEALTH OF VIRGINIA, *et al.*,
Cross-Petitioners,

v.

UNITED STATES OF AMERICA,
Cross-Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF OF WOMEN'S SCHOOLS TOGETHER, INC., BOYS' SCHOOLS: AN INTERNATIONAL COALITION;

(Additional Amici Listed on Inside Front Cover)

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MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE, WITHOUT OBJECTION BY THE PARTIES, PURSUANT TO RULE 29.2

Movants Women's Schools Together, Inc., et al. hereby seek leave of the Court to file their brief, amici curiae, lodged contemporaneously herewith, in accordance with Supreme Court Rule 29.2 for the following reasons:

1. Undersigned counsel was requested by amici to prepare an amicus brief to discuss the particular educational perspective of amici, which is different from that of the parties, and which, we believe, will be extremely useful to the Court in deciding this important case.

2. Counsel for amici was aware that certiorari was granted on October 5 and that briefs supporting cross-petitioners were due on December 15, but was unaware until late in the day on December 15 that the order granting certiorari suspended Rule 29.2 and required briefs actually to be filed and served by 3:00 p.m. on December 15, rather than being mailed on that date.

3. All parties have consented to the filing of this brief, amici curiae. The consent letters were filed with the Court prior to the filing deadline of 3:00 p.m. on Friday, December 15.

4. The brief was mailed by the printer to the Court on December 15, in accordance with Rule 29.2 and was served on counsel for all of the parties by mail on December 15.

5. Immediately upon learning of the shortened time requirements, late in the day on December 15, counsel called the Solicitor General, and the Solicitor General personally indicated that he had no objection to the filing of the brief on Monday, December 18, upon receipt by the Clerk, as if filed under Rule 29.2. Counsel for VMI also has consented to the filing of this brief, amici curiae, on December 18, as if filed under Rule 29.2.

6. In order to minimize any inconvenience to the two parties, a copy of the brief was sent by facsimile to each party at approximately 7:00 p.m. (CST) on Friday, December 15. A copy of the brief was also delivered to the Court at 8:25 p.m. (EST) on Friday, December 15, together with an explanatory letter from counsel.

7. A typewritten version of this motion, with a motion to dispense with the requirement for printing, was deliv-

ered to the Court on or about 11:25 a.m. on Monday, December 18, and date-stamped by the Clerk. The motion was delivered to the Court as soon as it arrived by overnight courier from St. Louis. Counsel for both parties were sent a copy of the motion, with first class postage prepaid, on Saturday, December 16, 1995.

8. The preparation of this brief required the expenditure of significant resources, and amici, many of whom are concerned educators who believe strongly in the benefits of single-sex education, should not be prejudiced by counsel's lack of awareness of the inapplicability of Rule 29.2 in this particular case.

Wherefore, amici respectfully pray that the Court grant this motion to file their brief, amici curiae, in accordance with Rule 29.2.

Respectfully submitted,

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Questions Presented

1. Whether a state or political subdivision is ever permitted to offer the benefits of same-gender education to one sex without offering them to the other.

2. Whether a state or political subdivision is permitted to offer different educational methodologies to each sex when providing same-gender education to both sexes.

Table of Contents

	Page
INTEREST OF AMICI CURIAE	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	7
ARGUMENT	10
I. Publicly-Sponsored Single-Sex Educational Programs Are Constitutionally Permissible If They Are Substantially Related to the Achievement of an Important Governmental Objective	10
A. The Promotion of Academic Achievement Constitutes an Important Governmental Objective	10
B. The Use of Same-Gender Education is Substantially Related to Achieving the Important Governmental Objective of Increasing Academic Achievement	11
II. A State is Constitutionally Permitted to Provide Same-Gender Education for One Sex Without Providing it for the Other	16
A. Local Communities and Educators Must Be Permitted to Prioritize the Use of Scarce Resources in Experimenting with Optional Same-Gender Programs	17
B. Local Communities and Educators Must Be Permitted to Make an Honest Assessment of Needs Rather than to Engage in Gestures of Superficial Equality	21

III. When Offering Single-Sex Education to Both Sexes, Educators Are Constitutionally Permitted to Use Different Educational Methodologies for Each Sex 24

CONCLUSION 27

Table of Authorities

Page(s)

Cases:

Adarand Constructors, Inc v. Peña, 115 S.Ct. 2097 (1995) 23

Brown v. Board of Education, 347 U.S. 483, 493 (1954) 11

City of Richmond v. J.A. Croson, 488 U.S. 469 (1989) 23

Craig v. Boren, 429 U.S. 190 (1976) 10,11,12

Frontiero v. Richardson, 411 U.S. 677 (1973) 10

Garrett v. Board of Educ., 775 F. Supp. 1004 (E.D. Mich. 1991) 19

Goodman v. Lukens Steel Co., 482 U.S. 656 (1987) 16

J.E.B. v. Alabama, 114 S.Ct. 1419 (1994) 10

Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981) 11,19,20,26

Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982). 10,12,16,19, 20,23,24,25,27

Newburg v. Board of Public Education, 9 Phila. 556 (C.P. Phila. County 1983), *aff'd*, 478 A.2d 1352 (Pa. Super. Ct. 1984) 11

Norwood v. Harrison, 413 U.S. 455 (1973) 27

Parham v. Hughes, 441 U.S. 347 (1979) 20

Plyler v. Doe, 457 U.S. 202 (1982) 11

Rogers v. Lodge, 458 U.S. 613 (1982) 16

Rostker v. Goldberg, 453 U.S. 57 (1981) 10,20,22,23

Stanley v. Illinois, 405 U.S. 645 (1972) 10

Stanton v. Stanton, 421 U.S. 7 (1975) 12

United States v. Doe, 465 U.S. 605 (1984) 16

Vorcheimer v. School Dist. of Philadelphia, 532 F.2d 880 (3d Cir. 1976), *aff'd by equally divided Court*, 430 U.S. 703 (1977) 11

Weinberger v. Weisenfeld, 420 U.S. 636 (1975) 12,20

Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980) 10

Statutes:

The Equal Educational Opportunity Act, 20 U.S.C. §§ 1701-1758 (1994) 21

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1994) 21

Other Authorities:

Am. Ass'n of Univ. Women Educ. Found., *How Schools Shortchange Girls* 147 (1992) 15

Anita Blair, *Separate and Equal*, N.Y. Times, November 20, 1995, at A15 23

Kristin Caplice, *The Case for Single Sex Education*, Harv. J. L. & Pub. Pol'y 227 (1994) 18,20,28

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Nos. 94-1941 and 94-2107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, *Petitioner*
v.
COMMONWEALTH OF VIRGINIA, *et al., Respondents.*

COMMONWEALTH OF VIRGINIA, *et al., Cross-Petitioners,*
v.
UNITED STATES OF AMERICA, *Cross-Respondent.*

On Writs of Certiorari to the
United States Court of Appeals for the Fourth Circuit

AMICI CURIAE BRIEF OF WOMEN'S SCHOOLS TOGETHER, INC.; BOYS' SCHOOLS: AN INTERNATIONAL COALITION; ROBERT BOBB; THOMAS H. BUTLER, Ed.D; DR. ROY J. DAWSON; PETER M. FLANIGAN; DR. RICHARD HAWLEY; FRANK HAYDEN; DR. SPENCER HOLLAND; NANCY E. KUSSROW; PROFESSOR MARY R. LEFKOWITZ; KATHLEEN S. McCREARY; JOAN S. McMENAMIN; JOSEPH W. McPHERSON; DR. ANGELA PIENKOS; DR. DIANE RAVITCH; DR. CORNELIUS RIORDAN; DR. JOSEPH SPIRITO; MICHAEL M. UHLMANN; AND THE HONORABLE ARNOLD W. WEBSTER, Ph.D. IN SUPPORT OF RESPONDENTS, CROSS-PETITIONERS

INTEREST OF AMICI CURIAE

This brief amici curiae is submitted by a diverse array of individuals concerned about the potential implications of the Court's resolution of this case. While all of the amici do not necessarily endorse the overall educational philosophy at VMI, they share a concern that this Court's decision will have consequences for what they believe is an important pedagogical alternative: single-sex education.

Some of the amici on this brief represent urban school districts which have developed or are considering the development of elementary or secondary same-gender programs. In the exercise of their professional judgment, these educators maintain that same-gender public schools or classes benefit young people, and they are concerned that a decision against VMI in this case will not only set back VMI but will also crush their fledgling programs. In addition, most of these educators teach at-risk, disadvantaged children. They do not want the Constitution interpreted in a way that permits only those who can afford private education to have access to the proven benefits of same-gender education.

Other amici are scholars, both women and men, who have spent years studying the educational system. These experts believe firmly, and with good cause, that single-sex education can help both boys and girls. They are concerned that a decision against VMI in this case could deny the benefits of same-gender education to future generations of young women and young men.

Other amici represent or teach at single-sex private schools. They are apprehensive about the implications of this decision for their schools. Some students at their institutions receive federal funds. Many of the institutions themselves are exempt from federal taxation as nonprofit organizations. Others receive substantial forms of federal or state aid. As the district court stated, "the public-private shibboleth is more apparent than real. It cannot be gainsaid that private colleges receive substantial

infusions of both federal and state money. Thus, the distinction [ ] draw[n] is illusory." Pet'r App. at 71a. These amici worry about the implications of this decision for same-gender private schools.

Descriptions of the amici are set forth in the attached appendix.[1]

STATEMENT OF THE CASE

Virginia offers a wide selection of publicly supported and privately funded colleges and universities. Pet'r App. at 187a. Fourteen of fifteen state-supported, four-year colleges in Virginia are now coeducational, the Virginia Military Institute (VMI) being the only exception. *Id.* at 185a, 187a. The Commonwealth currently has five private all-women's colleges and one private all-men's college. *Id.* at 189a. The hallmarks of Virginia's educational policy are "diversity and autonomy," with the Boards of Visitors of each institution having broad autonomy in the determination of its mission. *Id.* at 187a. The Commonwealth now offers three public programs of higher education targeted specifically at promoting leadership in military and civilian life. *Id.* at 107a, 202a-203a, 214a.

The Virginia Polytechnic Institute (VPI) offers both men and women the opportunity to pursue together this education in the VPI Corp of Cadets. *Id.* at 214a. The VPI method differs significantly from the system used at VMI, using "positive motivation" and recognizing individual differences in a more informal environment. *Id.* at 218a.

VMI offers men the opportunity to pursue together this leadership education through a unique, adversative method found by experts, the district court, and the court of appeals to be suited specifically for a sexually homogeneous environment. *Id.* at 148a, 171a, 173a. The adversative system includes physical

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[1] The parties' written consents to the filing of this brief have been filed with the Court.

rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior, and indoctrination in desirable values for VMI cadets. *Id.* at 191a-192a.

The Virginia Women's Institute for Leadership (VWIL), in its first year, offers women the opportunity to pursue together a leadership education through an analogy to the holistic VMI program, using a "cooperative method which reinforces self-esteem rather than the leveling process used by VMI." *Id.* at 63a-64a.

This case originated from a complaint filed in 1990 by the United States Department of Justice on behalf of a female high school student seeking admission to VMI. *Id.* at 160a. After a six-day trial, *id.*, the district court found three important governmental interests: (1) the diversity added by a same-gender VMI; (2) the substantial educational benefits flowing to each sex from same-gender education; and (3) the benefits flowing specifically to men from the adversative method:

> "[t]he evidence in the case, which is virtually uncontradicted, supports Virginia's view that substantial educational benefits flow from a single gender environment, be it male or female, that cannot be replicated in a coeducational setting." *Id.* at 176a-177a.

The court then held that Virginia's provision of same-gender education at VMI survived constitutional scrutiny under this Court's decision in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982). *Id.* at 177a.

The Fourth Circuit agreed with the district court about the undisputed and unique educational benefits associated with same-gender education, *see id.* at 150a-151a, but disagreed about the Commonwealth's ability, consistent with the Fourteenth Amendment, to provide this benefit only to men. *Id.* at 151a. In the process, however, the court affirmed the district court's *factual* findings that such a single-gender education is educationally justifiable. *Id.* The court also affirmed findings of

fact that "coeducation would destroy aspects of VMI's program which lie near the core of its holistic system ... deny[ing] those women the very opportunity they sought." *Id.* at 6a.

In finding a violation of the Fourteenth Amendment, the appellate court ultimately drew three significant conclusions:

> "(1) single-gender education, and VMI's program in particular, is justified by a legitimate and relevant institutional mission which favors neither sex; (2) the introduction of women at VMI will materially alter the very program in which women seek to partake; and (3) the Commonwealth of Virginia, despite its announced policy of diversity, has failed to articulate an important policy that substantially supports offering the unique benefits of a VMI-type of education to men and not to women." *Id.* at 155a.

Instead of mandating that women be admitted to VMI or that public funds be withdrawn from the institution, the Fourth Circuit remanded the case, permitting VMI to explore alternatives and specifically suggesting that VMI "might establish parallel institutions or parallel programs." *Id.* at 156a.

After the Fourth Circuit's decision, the Governor approved the proposed Virginia Women's Institute for Leadership (VWIL) at Mary Baldwin College (MBC), a private women's college. *Id.* at 102a, 122a. A task force, comprising faculty, staff and students at MBC, with the input of external education experts, developed an implementation proposal promoting the same goals and values as VMI, but intentionally using a different methodology. *Id.* at 102a-103a. Through a contractual arrangement with the state, *id.* at 104a, VWIL now is a "publicly-supported, single-sex education program with military training for women." *Id.* at 107a.

On remand, the district court was persuaded by the testimony of three experts that VWIL is "a pedagogically sound and justified program." *Id.* at 73a. Specifically relying on this expert testimony, the district court found that "the differences between

VWIL and VMI are justified pedagogically and are *not based on stereotyping*." *Id.* at 76a (emphasis added). Accordingly, the court concluded

> "[that] controlling legal principles in this case do not require the Commonwealth to provide a mirror image VMI for women. Rather, it is sufficient that the Commonwealth provide an all-female program that will achieve substantially similar outcomes in an all-female environment and that there is a legitimate pedagogical basis for the different means employed to achieve the substantially similar ends. VWIL satisfies the Fourth Circuit's requirement that the Commonwealth adopt a parallel program for women which takes into account the differences and needs of each sex." *Id.*

On the second appeal, the Fourth Circuit affirmed the district court, using a "heightened intermediate scrutiny test specially tailored to the circumstances..." *Id.* at 5a. The court observed that "[j]ust as a state's provision of publicly financed education to its citizens is a legitimate and important governmental objective, so too is a state's opting for single-gender education as one particular pedagogical technique among many." *Id.* at 21a. The court then concluded that "the only way to realize the [educational] benefits of homogeneity of gender is to limit admission to one gender." *Id.* at 22a.

Instead of ending the "*Hogan* analysis" with the two steps articulated in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), the Fourth Circuit added a third step, asking whether excluded men and excluded women have reasonable opportunities to obtain benefits substantively comparable to those they are denied. *Id.* at 24a.

After specifically rejecting the government's argument that a comparable opportunity requires an identical program, *id.* at 25a, 27a, the court of appeals held that the programs are substantively comparable in design and approved the remedy condi-

tioned on Virginia's maintaining a high level of commitment to VWIL. *Id.* at 27a-28a. The court of appeals issued a judgment accordingly, remanding the case to the district court with instructions regarding appropriate oversight of the implementation of the VWIL program. *Id.* at 30a.

SUMMARY OF ARGUMENT

Under the test in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982), a gender-based classification must serve important governmental objectives, and the discriminatory means employed must be substantially related to the achievement of those objectives.

Virginia has both a broad and a narrow important objective in employing the means of same-gender education. The first objective is the obvious responsibility of every state government to provide a superior education to all of its students. The second, narrower objective, which is related to the first, is to provide the discrete benefits of higher academic achievement, greater self esteem, and greater career advancement that have been proven to result from single-sex education.

If the objectives are sufficiently important, *Hogan* requires that the gender-based classification be substantially related to the achievement of those objectives. 458 U.S. at 724. Thus, a state or a school board must not use gender reflexively as an overbroad proxy for more relevant criteria. The creation of same-gender schools or classes is not an overbroad proxy. In fact, the educational benefit of same-gender education for *some* young people is beyond dispute. The evidence is strong and growing that same-gender education both improves the educational achievement of some young people and achieves the important goals of increased self-esteem, increased academic focus and *less* gender stereotyping.

Unquestionably, single-sex schools and classes substantially serve the important governmental interest of providing a superior education to some students. The issue in this case then

becomes: What constraints does the Constitution place on an educational authority's use of this important educational tool? Specifically, (1) is an educational authority ever permitted to offer the benefits of same-gender education to one sex without offering them to the other? And (2) is an educational authority permitted to offer different educational methodologies to each sex when providing single-sex education to both sexes?

Amici are concerned about the legal standard announced by the Fourth Circuit in this case. In order to provide guidance to lower courts, and more importantly to educators, this Court should lay to rest the notion that a state or school district is always required by the Constitution to provide parallel programs in order to initiate same-gender educational experimentation. A requirement of parallel programs in every instance will chill the revived interest in this important educational method.

In the case of urban school districts, which have the legitimate and substantial goal of providing a quality education to all their students, single-sex education can be warranted to ensure increased achievement for a subset of the overall student population for whom the current range of classroom settings is inadequate. In the best judgment of educators, the particular educational needs of some boys in certain urban areas, and some girls in others, cry out for alternative single-sex educational settings.

State governments and school districts operate under finite budgets to provide the range of educational programs that will best meet the educational needs of the total student population. School districts should not always be constitutionally required to offer parallel programs in each instance of experimentation with single-sex education. That requirement could force school districts to shift limited funds from other beneficial educational programs to create what may be, in their professional judgment, a much less needed same-sex program. The most likely outcome of a parallelism requirement for these school districts struggling to use their limited resources in the most effective manner

possible would be to abandon single-sex experimentation altogether — a tragic outcome, as this method is gaining in popularity and beginning to produce positive results for many children in our inner cities.

Certainly, when a state or school district offers the benefits of publicly funded same-gender education to both sexes, as Virginia has done in this case, the Constitution does not serve as an educational micromanager, second-guessing the methodologies recommended. In the case at hand, an independent group of experts in women's education recommended a non-adversative system as the most effective methodology to teach leadership and military skills to women. Virginia has provided substantial resources for the project. VMI has pledged both monetary and nonmonetary aid. Thus, the Commonwealth, having studied the issue thoroughly, has provided the resources and the support necessary to offer the significant benefits of single-sex education to both sexes. The Constitution requires no more, and the vast majority of parents and students would be disappointed with any less.

ARGUMENT

I. Publicly-Sponsored Single-Sex Educational Programs Are Constitutionally Permissible If They Are Substantially Related to the Achievement of an Important Governmental Objective.

In *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982), the Court articulated the standard for analyzing the constitutionality of a public university's policy of admitting members of only one gender to a particular educational program. Under this test, a gender-based classification is permissible if (1) "the classification serves 'important governmental objectives'" and (2) "'the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Id.* citing *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980).

A. The Promotion of Academic Achievement Constitutes an Important Governmental Objective.

This Court's Equal Protection jurisprudence requires that those using an explicit gender classification must put forward an "important governmental objective" as justification. *Hogan*, 458 U.S. at 724. The Court repeatedly has found objectives such as administrative ease and convenience insufficient to justify gender-based classifications. *Craig v. Boren*, 429 U.S. 190, 198 (1976), *citing Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (plurality opinion). The Court also has scrutinized carefully the "statutory objective itself" to insure that it does not reflect "archaic and stereotypic notions" or is not designed to "exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap." *Hogan*, 458 U.S. at 725. *See also J.E.B. v. Alabama*, 114 S.Ct. 1419, 1426 (1994).

In contrast, the Court has accepted as important governmental objectives the protection of public health and safety, *Craig v. Boren*, 429 U.S. at 199-200; the raising and supporting of armies, *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981); and the prevention

of illegitimate pregnancies. *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 470 (1981) (plurality opinion).

Although the cases do not offer a bright line for drawing distinctions between important and unimportant objectives, they indicate that an objective is important if it is a responsibility traditionally assigned to government and highly valued by citizens. *Cf. Craig v. Boren*, 429 U.S. at 199-200 (public health and safety represents "an important function of state and local governments").

Certainly, increasing academic achievement is more analogous to the interests found important by this Court than to those which have been rejected. "Today, education is perhaps the most important function of state and local governments." *Plyler v. Doe*, 457 U.S. 202, 222 (1982), *citing Brown v. Board of Education*, 347 U.S. 483, 493 (1954). In addition, "education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all." *Id.* "The primary aim of any school system must be to furnish an education of as high a quality as is feasible. Measures which would allow innovation in methods and techniques to achieve that goal have a high degree of relevance." *Vorcheimer v. School Dist. of Philadelphia*, 532 F.2d 880, 888 (3d Cir. 1976), *aff'd by equally divided Court*, 430 U.S. 703 (1977).[2]

B. The Use of Same-Gender Education is Substantially Related to Achieving the Important Governmental Objective of Increasing Academic Achievement.

"If the State's objective is legitimate and important, [the Court] next determine[s] whether the requisite direct, substantial

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[2] In *Vorcheimer*, the Third Circuit, utilizing emerging heightened scrutiny, permitted Philadelphia to retain an all-male high school and an all-female high school, finding the objective of a quality education sufficiently important. *But see Newburg v. Board of Public Education*, 9 Phila. 556 (C.P. Phila. County 1983), *aff'd*, 478 A.2d 1352 (Pa. Super. Ct. 1984) (state court found inequities between Central High School for boys and Girls High School for girls in violation of federal and state constitutions).

relationship between objective and means is present." *Hogan*, 458 U.S. at 725. "The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." *Id.* at 725-726.

In explaining how to determine the existence of a substantial relationship between means and ends, the Court in *Hogan* cited a series of cases in which the Court struck down statutes for unthinkingly applying traditional assumptions about the sexes. *Hogan*, 458 U.S. at 726 nn.11, 12. In those cases, state legislatures or the United States Congress reflexively used gender as an overbroad proxy for more relevant criteria. *See Craig v. Boren*, 429 U.S. at 201-02 (gender as a proxy for "drinking and driving"); *Stanton v. Stanton*, 421 U.S. 7, 13 (1975) (gender as a proxy for likelihood of attending college); *Weinberger v. Weisenfeld*, 420 U.S. 636, 643 (1975) (gender as a proxy for wage earning).

Rather than being an overbroad proxy, the gender distinction itself in single-sex education creates the desired unique educational benefits for both sexes. As noted by both courts below, the concrete benefits of same-gender education cannot be achieved for one sex unless the other is not present.[3] For that reason, the district court found and the Fourth Circuit agreed that "it would be impossible for a female to participate in the 'VMI experience' ... her introduction into the process would change it." *See* Pet'r App. at 155a, 175a. The benefits from this experience, like all same-gender experiences, flow from its homogeneity. Once a member of the other sex is introduced into the educational mix,

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[3] Of course, because co-education is the norm and same-gender education is optional, no one is forced to receive those benefits.

the class becomes coeducational and loses the distinctive benefits of same-gender education for both sexes.[4]

Both the district court's findings of fact and significant independent research demonstrate the close fit between the objective of higher academic achievement and the means of single-sex education.[5] The district court's findings of fact, upheld by the court of appeals, establish that "a substantial body of 'exceedingly persuasive' evidence supports VMI's contention that some students, both male and female, benefit from attending a single-sex college." *Id.* at 168a. The benefits found by the district court include growth in self-esteem, pursuit of non-traditional careers, and higher starting salaries after graduation. *Id.* at 169a.

Research regarding the benefits of same-gender schools at both the college and secondary school level supports the district court's findings of fact. In November 1995, a new study by Mikyong Kim and Rodolfo Alvarez concluded that "attending women-only colleges advantageously affects students' academic ability."[6] The researchers also believe that students in women-only colleges have better opportunities to be actively involved in

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[4] The government argues that excluded women who meet VMI's entrance requirements have a right to experience the "distinctive educational method" used at VMI. Again, the district court correctly found that the remedy would be illusory. "A coeducational VMI would offer neither males nor females the VMI education that now exists. The changes would substantially affect the method now used to educate citizen-soldiers." Pet'r App. at 227a. The district court found that it would be necessary to adapt VMI for privacy, to change certain physical training programs, and most importantly, to create different treatment for different classes, thus destroying the egalitarian ethic. *Id.* at 237a.

[5] The brief of amici curiae filed in support of the government by the American Association of University Professors, *et al.* argues that "the lower courts relied on palpably insufficient evidence to justify continuing sex discrimination." Brief for Amici Curiae, AAUP at 20 (No. 94-1941). The challenged findings of fact not only are not clearly erroneous, they are supported by the vast weight of the testimonial and scholarly evidence.

[6] Mikyong Kim & Rodolfo Alvarez, *Women-Only Colleges: Some Unanticipated Consequences*, 66 Higher Educ. 640, 661 (1995).

student organizations, to exercise leadership, and to improve their social self-confidence.[7]

Cornelius Riordan, who has written a book and conducted numerous studies on the benefits of single-sex schools,[8] supports this notion emphatically:

> "[s]ingle gender schools generally are more effective academically than coeducational schools. This is true at all levels of school, from elementary to higher education. Over the past decade, the data consistently and persistently confirm this hard-to-accept educational fact."[9]

In the same article, Riordan summarized the intense interest of educators, parents and students in same-gender education:

> "Single-gender schools work. They work for girls and boys, women and men, whites and nonwhites. Research has demonstrated that the effects of single gender schools are greatest among students who have been disadvantaged historically — females and racial/ethnic/religious minorities (both males and females)."[10]

At the secondary school level, researchers have found strong evidence that same-gender education enhances academic achievement and promotes greater self-esteem. A 1990 study by Lee and Marks found that both males and females attending single-sex schools were more likely than students in coeducational high

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[7] *Id.*

[8] *See* Cornelius Riordan, *Girls and Boys in School: Together or Separate?* (1990); Cornelius Riordan, *The Case for Single Sex Schools, reprinted in* Office of Educ. Research & Improvement, U.S. Dept. of Educ., *Single Sex Schooling: Proponents Speak* [hereinafter DOE Report] Vol. II, 47 (1992); Cornelius Riordan, *Public and Catholic Schooling: The Effects of Gender Policy*, Am. J. of Educ., Aug. 1985, at 518.

[9] Cornelius Riordan, *Reconsidering Same Gender Schools: The VMI Case and Beyond*, Educ. Wk., February 23, 1994, at 48.

[10] *Id.*

schools to attend selective four-year colleges and were more likely to consider applying to graduate schools.[11] The study also determined that young women in all-girls schools showed higher educational aspirations, more active political involvement, and ultimate satisfaction with academic and social aspects of college environment.[12]

At the same time, recent research has also questioned whether gender equity actually exists in public coeducational schools.[13] Indeed, three researchers have found evidence that "coeducational schools may foster stereotypical sex roles."[14]

Hence, the district court's conclusion that same-gender education provides educational benefits to *some* young people is more than amply supported in the record and by independent research.[15] Moreover, this Court has frequently noted its reluc-

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[11] V.E. Lee and H.M. Marks, *Sustained Effect of the Single-Sex School Experience on Attitudes, Behaviors, and Values in College*, 1990 J. of Educ. Psychol. 82, 578-592, *summarized in* DOE Report Vol. I, 13, 37-38 (1992).

[12] *Id.*

[13] Am. Ass'n of Univ. Women Educ. Found., *How Schools Shortchange Girls* 147 (1992) (girls do not receive equitable teacher attention, equitable attention in course materials or encouragement in math and science).

[14] Mary Moore et al., *Single Sex Schooling and Educational Effectiveness: A Research Overview*, *reprinted in* DOE Report Vol. I, 11 (1992).

[15] *See* Richard Hawley, *A Case for Boys Schools*, *reprinted in* DOE Report, Vol II, 11 (boys in boys schools do better than boys in coeducational schools on some measures — never, apparently, worse); Richard Hawley, *A Progressive Case for an Ancient Reform*, 92 Tchrs. College Rec. 433, 440 (1991) (schooling boys within structure designed to realize distinctive developmental features has resulted in high count of most longstanding and most demonstrably effective schools in world); Diane Ravitch, *Things Go Better in Single-Sex Schools*, Wash. Post, August 31, 1995, at A23 (of top 150 schools in Great Britain, only 14 were coeducational); Ann Zanders, *A Presentation of the Arguments For and Against Single-Sex Schooling*, *reprinted in* DOE Report, Vol. II, 15 (research shows that girls benefit from single-sex schools and shows promise and documented successes for African American children).

tance to disturb findings of fact concurred in by two lower courts. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *United States v. Doe*, 465 U.S. 605, 614 (1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982).

II. A State is Constitutionally Permitted to Provide Same-Gender Education for One Sex Without Providing it for the Other.

The evidence clearly indicates that single-sex education can be substantially related to achieving an important governmental objective. Of course, offering the educational opportunity to both sexes is the ideal in that both sexes benefit from the experience. However, these amici are concerned that transforming this ideal into an inviolable constitutional principle would impose rigidities on educators that would limit their abilities to provide promising alternatives to children in their schools. For many students, single-sex education is beneficial to higher educational achievement, greater self-esteem and enhanced career advancement. The important issue then becomes whether a state or political subdivision is free to use same-gender education to meet the needs of one gender without always offering a parallel program for the other gender. The Fourth Circuit, at the liability phase of this trial, found that Virginia had violated the Constitution by not making the benefits of same-gender education available to both sexes. Whether or not this Court agrees with the court below as to VMI's liability, the Court should clarify that the Constitution does not require this parallelism every time a state or school district determines that providing same-gender education for one sex would serve an important governmental objective.

A school district's ability to experiment constitutionally with single-sex schools or classes for only one sex turns on the Court's interpretation of footnote 17 in *Hogan*. 458 U.S. at 731 n. 17. In that footnote, the Court made clear that the issue is not whether

the benefited class profits from the classification, but whether the state's decision to confer a benefit only upon one class by means of such a classification is substantially related to achieving a legitimate and substantial goal. *Id.* This determination, of course, depends on the facts and circumstances of each case.

A. Local Communities and Educators Must Be Permitted to Prioritize the Use of Scarce Resources in Experimenting with Optional Same-Gender Programs.

Whether it is at the level of higher or elementary education, the practical impact of the Fourth Circuit's decision will be to discourage states and cities from offering the option of a single-sex education to students of one gender unless a "substantively comparable" parallel program is offered to students of the other gender, regardless of the need or resources required for such a program. A rigid requirement of parallelism simply is not useful to the real-life problems faced by school superintendents, administrators and teachers.

In 1991, the City of Detroit attempted to establish three all-male academies.[16] The task force recommending the male academies cited a series of dispiriting statistics to justify its important interest in exploring the possibilities of same-gender education. "Males of White, Hispanic and African American ethnic groups [were] at the greatest risk of dropping out of Detroit public schools."[17] Of the 24,000 males enrolled in the Detroit public high schools, fewer than 30% had cumulative grade point averages above 2.0.[18] Boys were suspended from Detroit public schools at three times the rate of girls.[19] Sixty

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[16] Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?*, 105 Harv. L. Rev. 1741, 1742 (1992).

[17] Detroit Public Schools, Male Academy Grades K-8: A Demonstration Program for At-Risk Males 15 (December 7, 1990) (working draft).

[18] *Id.*

[19] *Id.* at 16.

percent of the drug offenses in Wayne County were committed by 8th and 9th grade dropouts, and 97% of the offenders were African American males.[20] In sum, urban males suffered "a multitude of educational, social, health, and economic problems ... [M]ales appear[ed] to suffer disproportionate rates of school failure, poverty, violence, delinquency, unemployment, incarceration, illness and death."[21]

The report demonstrated that Detroit had previously responded to the problems of young, urban females. "When it was determined that 40% of the females who drop out of school, do so because of pregnancy, three schools and several programs were established to prevent, as well as address, the problems facing pregnant and parenting teens."[22] The report also showed a disparity in academic performance between boys and girls in the Detroit school system. Girls were suspended less often and did not drop out at the rate of boys. In addition, they outperformed boys on standardized tests.[23]

The Detroit academy demonstration program was designed to offer to boys the educationally sound benefits accompanying attendance at a single-sex school: self esteem, rites of passage, role model interaction and academic improvement.[24] The idea was popular, with 1200 applying for 560 spots.[25] The city had plans to open up similar Female Academies, but resource allocation forced it to prioritize the implementation of the program, believing males to be more at risk.[26]

[20] *Id.*

[21] *Id.* at 3.

[22] *Id.* at 15. *See* Kristin Caplice, *The Case for Single Sex Education*, Harv. J. L. & Pub. Pol'y 227, 276 (1994) [hereinafter *Single Sex Education*] (Detroit has existing single-sex schools, three for pregnant girls and one for boys in danger of expulsion).

[23] Caplice, *Single Sex Education*, at 276.

[24] *Id.* at 275.

[25] *Id.*

[26] *Id.*

Misapplying *Hogan*, a federal district court preliminarily enjoined the academies, finding that "there is no evidence that the educational system is failing urban males because females attend school with males." *Garrett v. Board of Educ.*, 775 F. Supp. 1004, 1008 (E.D. Mich. 1991). But neither *Hogan* nor its progeny required such a showing. The "means-ends" test should not be interpreted to require a strict correlation between a coeducational environment and educational impairment. Instead the burden is a positive one of demonstrating that single-sex schools and programs contribute to higher academic achievement, self-esteem and prospects for attending college.[27] Providing these concrete benefits to urban males is an important governmental interest, and the single-sex admissions standard of a school has been shown in independent research to be related, directly and substantially, to achieving that interest.

To be sure, single-sex academies have different and concrete benefits for girls. But the Detroit School Board, with very limited resources, prioritized its needs. The community, with the input of educational experts, decided first to create schools for pregnant teenagers, then to turn its attention to at-risk males. Of course, if Detroit may not constitutionally provide male academies, then it raises the question whether Detroit was permitted under the Constitution to initiate schools for pregnant mothers, without parallel schools for boys. Amici believe strongly that schools for pregnant mothers are constitutional in that "the gender classification is not invidious, but rather reflects the fact that the sexes are not similarly situated in certain circumstances." *Michael M. v. Superior Court of Sonoma County*, 450 U.S. at 469 (plurality opinion).

A city's prioritizing decisions are not invidious gender classifications, but rather *realistic* reflections of the fact that males and females are not fungible. *Id.* Just as "a legislature may provide

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[27] *See* Note, *Inner-City Single-Sex Schools: Educational Reform or Invidious Discrimination?*, 105 Harv. L. Rev. 1741, 1750-51 (1992).

for the special problems of women," *id.*, *citing Weinberger v. Weisenfeld*, 420 U.S. 636, 653 (1975), a city should be able to respond to the very real needs of urban males, provided that it has done so in a reasoned way, without relying on "archaic and stereotypic notions," *Hogan*, 458 U.S. at 725, or in a way which "demean[s] the ability or social status of the affected class." *Michael M. v. Superior Court*, 450 U.S. at 469, *citing Parham v. Hughes*, 441 U.S. 347, 354 (1979) (plurality opinion). If the Fourth Circuit's emphasis on "parallelism" is interpreted to require that every time a school district initiates an educational experiment designed to address real problems with one gender it must simultaneously initiate a "substantively comparable" educational experiment with the other gender, the courts will have placed an inadvisable straitjacket on school districts and parents in the use of single-sex schooling:

> "[C]ities [should not be] categorically prevented from doing what they c[an] to address the particular needs of specific elements of [their] school-age population simply because [they] [cannot] simultaneously offer a solution to every problem facing every group. This is the kind of flexibility that is essential to the education reform that the country desperately needs."[28]

The Constitution does not require absolute and simultaneous parallelism. "The Constitution requires that [government] treat similarly situated persons similarly, not that it engage in gestures of superficial equality." *Rostker v. Goldberg*, 453 U.S. at 79.

The practical effect of the Fourth Circuit's test in a poor city will not be to expand opportunities for girls but instead to quash the experimentation for boys. If Detroit cannot afford to create male academies and female academies concurrently, the lower court's standard effectively requires them to abandon both projects.

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[28] Caplice, *Single Sex Education*, at 276.

B. Local Communities and Educators Must Be Permitted to Make an Honest Assessment of Needs Rather than to Engage in Gestures of Superficial Equality.

In Ventura, California; Manassas, Virginia; Baltimore, Maryland; and Philadelphia, Pennsylvania, among other areas, school districts have offered or proposed to offer classes, programs or entire schools targeted at girls.[29] Ventura was told by the Department of Education to rename classes aimed at females as classes for the "mathematically challenged," presumably to avoid a loss of federal funds or a constitutional challenge.[30] Philadelphia and Baltimore each has an all-girls high school, although each says that boys are free to apply.[31]

According to one strong supporter of single-sex schools, "[c]lasses like those in Ventura County ... survive constitutional challenge by formally opening their doors to men, with a wink and a nod to keep them from coming in."[32] Statutory requirements aside,[33] amici believe that the Constitution does not

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[29] *See* Eric Wee, *A Lesson in Confidence: Va. Middle School Tries All-Girl Classes*, Wash. Post, May 1, 1995, at A1; Catherine Saillant, *Ventura's All-Girl Math Classes Pass Test on Bias; U.S. Civil Rights Authorities Suggest Courses Be Renamed but Find They Do Not Discriminate Against Boys*, L.A. Times, March 8, 1995, at B1; Laura Rehrmann, *Where the Smart Girls are Away from Boys, Western Students Excel*, Balt. Sun, January 27, 1990, at 3B.

[30] Catherine Saillant, *Ventura's All-Girl Math Classes Pass Test on Bias; U.S. Civil Rights Authorities Suggest Courses Be Renamed but Find They Do Not Discriminate Against Boys*, L.A. Times, March 8, 1995, at B1.

[31] Laura Rehrmann, *Where the Smart Girls are Away from Boys, Western Students Excel*, Balt. Sun, January 27, 1990, at 3B.

[32] Susan Estrich, *For Girls' Schools and Women's Colleges; Separate is Better*, N.Y. Times, May 22, 1994, § 6, at 39.

[33] Amici realize that these schools may still encounter opposition from the federal government under two federal statutes, *see* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1994) and the Equal Educational Opportunity Act, 20 U.S.C. §§ 1701-1758 (1994).

require the cities of Baltimore, Philadelphia and Ventura to maintain "gestures of superficial equality," *see Rostker v. Goldberg*, 453 U.S. at 79, by permitting boys to apply to their all-girls math classes and high schools when the boys' presence will change the dynamic believed by educators and researchers to provide the desired benefits for girls.

Ventura launched high school classes aimed at females because studies had shown that girls' grades and interest in math begin to fall off markedly during junior high.[34] The Unified School District conducted a survey to identify barriers that deter female students from taking advanced math classes. The school district then launched an experimental program described as follows: "[o]ur project, E.D.G.E. (Educational Diversity for Gender Equity), addresses negative perceptions through the vehicle of an algebra 2 class exclusively for female students."[35] As has been demonstrated, same-gender classes have been proven extremely effective in addressing this specific need.[36]

Just as Detroit should be free to respond to research regarding urban males, Ventura should be permitted to do so for females.[37]

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[34] Catherine Saillant, *Ventura New Math Class Recruiting Method*, L.A. Times, February 4, 1995, at B2.

[35] Ventura Unified School District, *Educational Diversity for Gender Equity Proposal*, (undated manuscript) at 2 (characterized by Assistant Superintendent Patricia L. Chandler Ed.D., Ventura Unified School District, as a "proposal which describes need, goals, and program design" in letter to Peter Leibold (November 21, 1995)).

[36] *See generally* DOE Report Vols. I and II (1992).

[37] Although amici for petitioner argue that programs on behalf of women should be subject to less scrutiny than those for men, *see* Brief for Amici Curiae, Employment Law Center, et al. at 25-30 (Nos. 94-1941, 94-2107), this view is shortsighted since optional same-gender education has different benefits, and few costs, for each sex. In addition, those favoring "affirmative action" for women alone at the college level must, in making their case, deal with recent statistics regarding the greater percentages of women in higher

(Footnote 37 continued on next page)

Of course, the decision must be reasoned, without employing archaic stereotypes, and must be targeted at obtaining tangible benefits. *See Hogan*, 458 U.S. at 724-25. In addition, the system as a whole must provide diverse opportunities, with programs targeted at producing beneficial outcomes, for the other sex.

Amici do not contend that it would be permissible for a school district to concentrate all of its attention at improving the educational achievement of one gender while systematically ignoring the other. This is not to say, though, that a rigid parallelism is required or that it is always impermissible to improve the achievement of one gender without improving the other, if the opportunity presents itself. In addition, efforts on behalf of each gender should not have to be exactly the same. For instance, if Ventura's educational experts do not believe that an all-male math class would benefit boys but that a coeducational program to stimulate interest in the arts would be more beneficial, the Constitution should not require a "gesture of superficial equality," *see Rostker v. Goldberg*, 453 U.S. at 79, in order to justify an all-female math class.

In sum, this Court should clarify the Fourth Circuit's standard to rid the decision of its foreseeable consequences: a slavish fidelity to parallelism, regardless of the circumstances facing a state or school district.

(Footnote 37 continued)

education in every year since 1978. Anita Blair, *Separate and Equal*, N.Y. Times, November 20, 1995, at A15. Following this Court's decisions in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989) and *Adarand Constructors, Inc v. Peña*, 115 S.Ct. 2097 (1995), "invidious" or "benign" discrimination receives the same level of scrutiny. This does not mean, of course, that increased scrutiny will not permit a court from taking "relevant differences" into account. *Adarand*, 115 S.Ct. at 2113. "[A] gender based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened." *Hogan*, 458 U.S. at 728. The burdens accompanying life as an urban male need to be addressed as well.

III. When Offering Single-Sex Education to Both Sexes, Educators Are Constitutionally Permitted to Use Different Educational Methodologies for Each Sex.

In the case at hand, the remedy for the alleged constitutional violation, extending the benefits of publicly-funded same-gender education to women in a manner considered most effective by educational experts, certainly meets the standard enunciated in *Hogan*.[38] As has been shown, the objective of providing women and men with the establishebenefits of single-sex education is a legitimate and important one. The remaining question, then, is whether the means of providing same-gender education, using different educational methodologies for each sex, substantially serves the achievement of that objective.

As stated previously, "[i]f the State's objective is legitimate and important, [the Court] next determine[s] whether the requisite direct, substantial relationship between objective and means is present." *Hogan*, 458 U.S. at 725. "The purpose of requiring that close relationship is to assure that the validity of the classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the sexes." *Id.* at 725-26.

Virginia's remedy of creating a VWIL to complement VMI and VPI substantially serves the important governmental objectives of providing a public education and offering the established

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[38] The Fourth Circuit felt compelled to add a third "substantive comparability" prong to the *Hogan* test. Although amici understand the court's goal, this requirement is unnecessary. If the government's objective is to provide the benefits of same-gender education to both sexes, and it does so in a way that reasoned analysis dictates will not succeed for both genders, the second prong in *Hogan* has not been satisfied. The means employed are not substantially related to achieving the Commonwealth's important goals. In the case before the Court, however, Virginia has done everything in its power to see that both programs succeed, including choosing the educational methodologies which experts believe will make for both a successful VMI *and* a successful VWIL.

benefits of increased academic achievement and superior leadership training for both men and women. Respondents have articulated forcefully and at some length the reasoned analysis by the Commonwealth and by VMI's Board of Visitors used in deciding to retain VMI's single-sex policy. Brief for Cross-Petitioners, at 28-32 (No. 94-2107). For present purposes, it is enough to say that VMI, in exercising its delegated authority from the Commonwealth, appointed a Mission Study Committee to consider carefully the "legality and wisdom of VMI's single-sex policy." Pet'r App. at 208a. After extensive study and site visits, the Mission Committee recommended remaining a single-sex institution because attracting women would be difficult and their admission would "alter the mission of VMI." *Id.* at 212a, 214a.

After the decision on liability in this case, the Commonwealth again made a reasoned study of the most effective way to "provide women the access to a single-sex educational program which would prepare them for leadership positions in civilian and military life." *Id.* at 101a. The district court found as a fact that "[t]he methods by which this goal could be achieved were the subject of intensive study and planning by professionals who are leaders in the field of designing and implementing educational programs for women." *Id.* at 63a. Thus, the decisions regarding admissions and teaching methodology were not made reflexively, but with care, in a reasoned, informed manner. *See Hogan*, 458 U.S. at 726 nn. 11, 12.

The Commonwealth and VMI have crafted a meticulous plan to make VWIL a success. Virginia, among other things, will contribute "dollar-for-dollar for VWIL students as it pays for VMI." Pet'r App. at 80a n.18. The VMI Foundation will endow the VWIL program with a contribution of $5.4625 million in addition to its other contributions. *Id.* at 120a. The VMI alumni association will support VWIL graduates with its alumni network. *Id.* at 120a, 121a. Thus, in its remedial plan, the

Commonwealth has used a reasoned approach in making available the distinct benefits of same-gender education for each sex.[39]

As stated earlier, the benefits from the single-sex experience flow from its homogeneity. Thus, underlying the decision to provide same-gender schools is not an overbroad generalization based on sex which is entirely unrelated to any differences between men and women or which demeans the ability or social status of the affected class. *See Michael M. v. Superior Court*, 450 U.S. at 469 (plurality opinion). The Equal Protection Clause does not "'demand that a statute necessarily apply equally to all persons' or require 'things which are different in fact to be treated in law as though they were the same.'" *Id.* This Court has consistently upheld state action where the gender classification is not invidious but rather realistically reflects the fact that boys and girls, men and women, do not always have the same needs and do not always benefit equally from a given approach. *Id.*

In deciding to offer public single-sex education to both women and men, Virginia has a right to depend on the reasoned, respected views of relevant experts in determining the educational methodology which would be most advantageous to fulfill each school's respective mission. As the court of appeals stated, "we should not reject programs that are aimed at achieving

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[39] The government argues that the forced coeducation of VMI is required because excluded women must have access to the "intangible qualities" which make for the greatness of the school. Brief for Petitioner, at 25 (No. 94-1941). If taken to its logical conclusion, this argument does nothing less than require the abolition of public single-sex schools or at least those schools deemed to have intangible benefits. There will always be intangible differences in distinct schools. Not borne of malice or invidious discrimination, some schools will have better teachers. Others will have wealthier alumni. These "intangible qualities" are the product of the fact that all schools are unique. If any individual of one sex has a right to obtain admission to another school, limited to the opposite sex, because that school is different, public single-sex schools by definition will be a thing of the past.

similar results, not generally available from other institutions of higher learning, simply because they differ in approach." Pet'r App. at 26a. The Constitution does not require cookie-cutter, single-sex schools, all forced to offer their students the exact same educational methodology for fear of being dragged into court. Such a requirement would go well beyond *Hogan* or anything this Court has even implied.

CONCLUSION

Virginia's remedy in this case fully satisfies the requirements of the Fourteenth Amendment. The result of a holding against VMI would be to threaten every single-sex public school in the country and possibly to endanger numerous single-sex private schools.[40]

Recent experimentation with same-gender classes for both sexes in Baltimore and other cities, which have a track record of

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[40] In an amici curiae brief submitted in support of the government, 26 private women's colleges struggle mightily to distinguish themselves from VMI. While citing numerous cases on the "state action" doctrine, the brief contains no persuasive argument to differentiate this Court's decision in *Norwood v. Harrison*, 413 U.S. 455 (1973). In *Norwood*, this Court found that the provision of free textbooks to students attending racially discriminatory schools constituted unconstitutional state action: "A State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of *giving significant aid* to institutions that practice racial or *other invidious discrimination*." *Norwood*, 413 U.S. at 467 (emphasis added). The amici women's colleges offer the following less-than-convincing distinction: "th[is] Court's broad reading of the state action in th[is] case has been limited to circumstances in which the challenged action involves invidious racial discrimination." Brief for Amici Curiae, Twenty-six Private Women's Colleges, at 19 n.12 (Nos. 94-1941, 94-2107). If this Court accepts the government's invitation to make gender a suspect class or requires all public schools to be coeducational, we do not feel as confident as those amici that aid given to private, same-gender schools would be insulated from attack.

increasing achievements among disadvantaged children,[41] would be jeopardized. This would be a tragedy for those children — one not required by the Constitution or this Court's precedents. We urge the Court to find Virginia's chosen remedy for the alleged constitutional violation below consistent with the Fourteenth Amendment, and at the very least, to clarify the standard enunciated below regarding the need for a strict parallelism in the offering of same gender opportunities. For the foregoing reasons, the judgment of the Fourth Circuit in No. 94-1941 should be affirmed.

Respectfully submitted.

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[41] *See* Caplice, *Single-Sex Education*, at 277 (reporting the success of same gender classes for both boys and girls in Baltimore, Milwaukee, Washington, D.C., Norfolk, and Dade County); *see also* Letter from Cornelius Riordan to Senator John C. Danforth (June 30, 1994), *reprinted in* Cong. Rec. S10,205 (daily ed. August 1, 1994) (preliminary data on single-sex classrooms in a public elementary school that is 98 percent African- and Hispanic-American showed that students in single-gender classes outperformed co-educational classes in NCE reading and mathematics tests, higher attendance rates, lower suspension rates and higher parental participation rates).

APPENDIX

Women's Schools Together, Inc.

Women's Schools Together, Inc. is a national coalition of Catholic high schools for young women. The group is committed to ensuring the option of women's single-gender education and to revisioning the education of women for the 21st century. Women's Schools Together includes approximately 150 Catholic women's high schools nationwide.

Boys Schools: An International Coalition

The coalition is an association of educators representing 150 schools dedicated to understanding and promoting the development of school-age boys. In promoting schools and school programs that focus on the distinctive tempo, sequence, and style of boys' learning, the Coalition aims to insure a future in which humane and capable boys will bring their gifts to bear on the creation of a just and livable world.

Robert C. Bobb

Robert C. Bobb is the City Manager of Richmond, Va. He has served previously in that capacity for Kalamazoo, Michigan and Santa Ana, California. Mr. Bobb has served on the Virginia State Crime Commission and presently serves on the Commission on Parole Abolition and Sentencing Reform. Governor L. Douglas Wilder appointed Mr. Bobb to the Board of Visitors of the Virginia Military Institute. He is also a Fellow of the National Academy of Public Administration. Mr. Bobb's interest in this case stems not only from his seat on the Board of Visitors of VMI but also from his deep commitment to improving the lives of urban youth. Mr. Bobb believes that same-sex education can play a valuable role in accomplishing that task.

Thomas H. Butler, Ed.D.

Thomas H. Butler is the President of the Governing Board of Tempe Preparatory Academy (TPA) in Tempe, Arizona. TPA will be a co-ed, publicly and privately funded Arizona Charter

school with ultimate enrollment of 216 students in grades seven through twelve. TPA envisions itself as a community of learners, both teachers and students, promoting personal integrity, diligent scholarship, creative imagination, community service, and a life-long quest for learning. It is TPA's belief that the greatest educational achievement in its Charter School can be made if boys and girls are in single-sex classrooms.

Dr. Roy J. Dawson

Dr. Roy J. Dawson Jr. is Superintendent of Schools in Camden City, New Jersey. He also is an adjunct professor at Glassboro State College. He has served in numerous capacities for the City of Camden, including as the Director of its Title I program and as the Acting Assistant Superintendent responsible for Compensatory Education, Migrant Education, Bilingual Education and Staff Development programs in Camden City. At the present time, he is responsible for 34 schools, and 20,000 students in Camden. Camden City presently employs same-gender experimentation in its schools and has a keen interest in the continuation of this experimentation with this valuable pedagogical tool.

Peter M. Flanigan

Peter M. Flanigan is a Director of Dillon, Read & Co., a New York City international investment banking firm. He is the founder and the Chairman of the Finance Committee of the Student/Sponsor Partnership, a Trustee of the Manhattan Institute for Policy Research and the founder of its Center for Educational Innovation. He is a member of the New York City Partnership's Education Committee and is committed to providing the benefits of single-sex education to the youth of New York City.

Dr. Richard Hawley

Dr. Richard Hawley is headmaster of the University School, an all-boys school in Cleveland, Ohio. In 1994, he was elected President of Boys' Schools: An International Coalition. Dr.

Hawley has written extensively on the subject of single-sex education for boys and has taught courses in history, government, economics and philosophy. He has lectured and spoken extensively on child development and education issues.

Frank Hayden

Frank Hayden is former president of the Detroit Board of Education and was the chairman of the board committee that recommended the establishment of three all-male academies after studying the academic performance and disciplinary problems of urban male students.

Dr. Spencer Holland

Dr. Spencer Holland is President of Project 2000, Inc., a nonprofit corporation whose primary mission is to provide continuing educational direction, guidance and financial support to inner-city African American males from 7th to 12 grades. He founded the Center for Educating African-American Males and has served in a variety of teaching and administrative positions in urban public school systems. He has worked closely with the Baltimore City Public Schools in implementing same-gender classroom organization in elementary schools and with the Camden public schools at the middle school level.

Nancy E. Kussrow

Ms. Nancy E. Kussrow is the Executive Director of the National Association of Principals of Schools for Girls. The Association exists to serve the cause of education for women and girls. Organized in 1920 and operated exclusively for charitable and educational purposes, the NAPSG is an association of approximately 550 members: heads and other administrators of independent schools enrolling girls, and executives of colleges representing wide geographical diversity. Ms. Kussrow has been the Executive Director of the NAPSG since 1981 and before that served as a principal and teacher in Kentucky and Michigan.

Professor Mary R. Lefkowitz

Professor Mary R. Lefkowitz is the Andrew W. Mellon Professor in the Humanities at Wellesley College. She is the author of many books on the ancient world, including *Lives of the Greek Poets* and *Women in Greek Myth*, as well as articles for *The Wall Street Journal* and *The New Republic*. She is the co-editor of *Women's Life in Greece and Rome* and of the forthcoming *Black Athena Revisited*. She teaches at one of the most prestigious all-women's colleges in America and has a significant interest in the success of same-sex schools.

Kathleen S. McCreary

Kathleen S. McCreary is a senior tax attorney at the Metlife Insurance Company. She serves on the Boards of Directors of the Catholic League for Religious and Civil Rights and the Center for Law and Religious Freedom. She is a graduate of Wellesley College and a strong advocate of the benefits of same-gender education.

Joan S. McMenamin

Ms. Joan S. McMenamin is the Headmistress Emerita of the Nightingale-Bamford School. She is on the Board of Trustees of the Lawrenceville School and a member of the Headmasters Association and the Headmistresses Association of the East. She previously served as President of the New York State Association of Independent Schools, the National Association of Principals of Schools for Girls and the Headmistresses Association of the East.

Joseph W. McPherson

Joseph W. McPherson has been headmaster of The Heights School since 1984. The Heights is an independent college preparatory day school for boys in grades three through twelve. The school was founded in 1959.

Dr. Angela Pienkos

Dr. Angela Pienkos is chief administrator of Divine Savior Holy Angeles High School. She has served in that capacity for twenty years. The Catholic all-girls high schools has an enrollment of 570, and this institution as well as its chief administrator have a keen interest in continuing to provide the benefits of a single-sex institution to young women..

Dr. Diane Ravitch

Dr. Diane Ravitch is a Senior Research Scholar at New York University. She served as an Assistant Secretary of Education for the Office of Educational Research and Improvement under President George Bush. While at the Department, she commissioned an impartial review of research on single-gender schooling. She has written on the subject and believes that same-gender opportunities should be available for both young women and young men. She has a deep interest in the educational achievement of young Americans in the setting most appropriate for each child.

Dr. Cornelius Riordan

Dr. Cornelius Riordan is Professor of Sociology at Providence College. He received an M.A. in Sociology from Clark University, his doctorate in Sociology from Syracuse University, and he completed two years of postdoctoral work in educational research at Johns Hopkins University. His area of specialization is the social organization of schools and the educational outcomes that are related to school organization. He has studied the affects of single-gender education at all levels of schooling for the past decade. He is the author of *Girls and Boys in School: Together or Separate?* and numerous professional articles on this topic.

Dr. Joseph P. Spirito

Dr. Joseph P. Spirito is the Superintendent of Schools for the Ventura Unified Schools District in Ventura, California. He

oversees a budget of $65 billion budget, 16,300 students, and 1,200 employees. Ventura has initiated the "Educational Diversity for Gender Equity" proposal. The proposal was designed to address the underrepresentation of women in careers that require a math and/or science background. Because of his involvement in this issue, the superintendent has a keen interest in the constitutional analysis used to evaluate same-gender classes and schools.

Michael M. Uhlmann

Michael M. Uhlmann is a senior fellow in Law and Public Policy at the Ethics and Public Policy Center in Washington, D.C., concentrating in education policy, among other issues. He has taught law at the George Mason University Law School and served in the United States Department of Justice. He served as a Special Assistant to President Ronald Reagan and has a deep and abiding interest in the continuation of single-sex schools for both young men and young women..

The Honorable Arnold W. Webster, Ph.D.

The Honorable Arnold W. Webster has been the Mayor of the City of Camden since January 1994. He has served in Camden City public education for more than two decades. He served as superintendent of schools from July 1986 until January 1994. He was assistant superintendent for eleven of the twelve years preceding 1986. The Mayor has received numerous awards, including the Youth of Camden's Outstanding Citizen Award.

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DEC 29 1995

Nos. 94-1941 and 94-2107

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, *Petitioner,*

v.

COMMONWEALTH OF VIRGINIA, *et al.*, *Respondents.*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF LATE DUE TO ERROR IN FILING PROCEDURE

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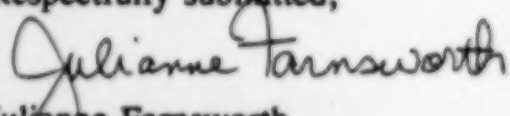
BEST AVAILABLE COPY

Movant, The South Carolina Institute of Leadership for Women, appearing as amicus curiae, hereby respectfully moves this Honorable Court for leave to file its amicus curiae brief on behalf of the Respondents late. As grounds for this motion, movant states the following: movant was granted permission, by consent, to file an amicus curiae brief in the above captioned case. After the brief was prepared, it was sent to Brief Printing Specialists, Inc., 1001 E. Main Street, Suite 210, Richmond, Virginia 23219, with specific instructions that the brief had to be filed with this Honorable Court no later than Friday, December 15, 1995. The Certificate of Service from the printer indicated that the brief was filed with this Court on December 15, 1995. However, the Clerk of this Court brought to our attention on today's date, December 28, 1995, that the brief was filed by certified mail on December 15, 1995, but was not received by this Court

until December 19, 1995. As a result, the brief was considered late. The printers have acknowledged the filing error and have indicated that they believed in good faith that filing by certified mail on December 15, 1995, was acceptable filing to meet the specified deadline. Due to the fact that the error was made in good faith by a third party, the printing company, and the brief was received only two days late, via certified mail, by this Court, Movant respectfully requests that the brief be accepted as if filing had occurred timely and be considered by the Court in support of Respondents in this case.

Respectfully submitted,



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OCTOBER TERM, 1995

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE SOUTH CAROLINA INSTITUTE OF LEADERSHIP FOR WOMEN IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

INTERESTS OF AMICUS CURIAE 1

STATEMENT 2

SUMMARY OF ARGUMENT 9

ARGUMENT 13

A. Single-Gender Education Is Beneficial to Both Sexes and Public Support of Single-Gender Educational Programs Constitutes a Legitimate and Important Governmental Objective 13

B. The Principles of VMI I and VMI II and Their Precedential Value Have Broad Implications for Other Institutions of Higher Learning and the Students Who Are Enrolled In Them, and These Implications should be considered by this Court 20

CONCLUSION 23

APPENDIX A 24

TABLE OF AUTHORITIES

Page

Cases

Craig v. Boren, 429 U.S. 451 (1976) 16

Faulkner v. Jones, 10 F.3d 226,
(4th Cir. 1993) 11, 20

Faulkner v. Jones, 51 F.3d 440,
(4th Cir. 1995) 5, 11, 21

Faulkner v. Jones, 858 F. Supp. 552
(D.S.C. 1994) 21

Sweatt v. Painter, 339 U.S. 629 (1950) 18, 19

United States v. Commonwealth of Virginia, et al., 44 F.3d 1229 (4th Cir. 1995), *cert. granted*, 116 S. Ct. 281 (1995) . . 1, 9, 10, 11, 14, 15, 16, 17, 18, 19, 20

United States v. Commonwealth of Virginia, 976 F.2d 890, (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993) 9, 10

United States v. Commonwealth of Virginia, 766 F. Supp. 1407 (W.D. Va. 1991) 14

United States v. Commonwealth of Virginia, 852 F. Supp. 471 (W.D. Va. 1994) 15

Page

State Legislative Resources

1995 S.C. Acts 145, Part II, §§ 95(A)-(B) 5

S.C. H. Con. Res. 4170, 110th Leg., 1st Sess. (1993) 3, 4

Journal of the Senate of the State of South Carolina, No. 67 (May 4, 1995) 6

January 1994 Report, Legislative Committee to Study the Provision of Single-Gender Educational Opportunities for Women 4

South Carolina's Proposed Remedial Plan 7,8

Other Resources

Agreement between the State of South Carolina and Converse College, June 5, 1995 9

Amicus Brief of Nancy Mellette in Support of Petitioner 21

Brief of Twenty-Six Private Women's Colleges as Amici Curiae in Support of Petitioner 13, 14

1994-1995 Converse College Catalog 3

INTERESTS OF AMICUS CURIAE

The South Carolina Institute of Leadership for Women (SCIL) at Converse College in Spartanburg, South Carolina, commenced in 1995 to provide young women the opportunity to receive publicly supported single-gender education. SCIL is designed to achieve, through a single-gender leadership program for women, benefits comparable to the benefits The Citadel Corps of Cadets achieves through a single-gender leadership program for men. SCIL's 1995-96 class includes twenty-two young women who have enrolled in the program to obtain the knowledge, skills, character, and experiences which will allow them to take positions of leadership in the private and public arena, including the military. These twenty-two young women have a substantial interest in the outcome of this case. As will be discussed more fully herein, the controlling principles that are present in *United States v. Commonwealth of Virginia, et al.*, 44 F.3d 1229 (4th Cir. 1995),

cert. granted, 116 S. Ct. 281 (1995) are extremely important to these young women and to their continued right to have the opportunity to participate in this unique, publicly supported single-gender educational program. Therefore, the students of SCIL submit this brief as amicus curiae to bring to the Court's attention their interest in this review of the VMI litigation and to urge affirmance of the decision of the court of appeals.[1]

STATEMENT

Converse College, a private four-year women's college, was founded in 1889. For one hundred six years, Converse College has been preparing women for leadership. Recruiting publications assert that a Converse College education prepares young women "for informed and responsible decisionmaking, reasoned and humane

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[1] The written consents of the parties to the submission of this amicus curiae brief have been filed with the Clerk of the U.S. Supreme Court pursuant to Sup. Ct. R. 37.3.

action, and significant and influential achievement." 1994-1995 Converse College Catalog at 7-8. The development of leadership has always been an important and integral aspect of the educational program at Converse College. In 1993, Converse College began developing a more formal and focused approach to its leadership education, which resulted in the establishment of a leadership curriculum.

In 1993, the South Carolina General Assembly was also addressing single-gender higher education in South Carolina. In May 1993, the General Assembly adopted a resolution affirming a "policy of choice" which included offering citizens of South Carolina the option of single-gender higher education. "South Carolina has historically supported and continues to support single-gender educational institutions as a matter of public policy based on legitimate state interests where sufficient demand has existed for particular single-gender programs thereby justifying the expenditure of public funds to support such

programs." S.C. H. Con. Res. 4170, 110th Leg., 1st Sess. (1993). To deal squarely with the fact that South Carolina's state-supported educational institutions did not include such an option, the General Assembly established a 10-member committee and directed them to formulate recommendations for the General Assembly to consider in exploring alternatives for the provision of single-gender educational opportunities for women. The committee was charged with preparing a report and submitting it to the General Assembly at the beginning of the 1994 Session. A report was prepared and submitted in January 1994. This report concluded that any single-gender educational opportunity for women should achieve the same educational objectives which are provided for the young men who attend The Citadel. January 1994 Report, Legislative Committee to Study the Provision of Single-Gender Educational Opportunities for Women.

In April of 1995, the court of appeals held that "[i]f [South Carolina] elects to maintain single-gender education at The Citadel, then it must provide parallel programs for men and women that are substantively comparable." *Faulkner v. Jones*, 51 F.3d 440, 448 (4th Cir. 1995).

The South Carolina General Assembly, as part of the 1995-96 General Appropriations Act, passed a resolution reaffirming South Carolina's commitment to single-gender education, finding that opportunities to attend a single-gender college fulfill an important and legitimate state objective and stating that the single-gender offerings need not be identical in form and detail but should be designed to achieve substantively comparable outcomes. 1995 S.C. Acts 145, Part II, §§ 95(A)-(B).

Simultaneous with the passage of the resolution, the South Carolina General Assembly approved the concept of SCIL by enacting legislation providing for long-term funding for SCIL. *Id.* Included in this funding amendment

to the 1995-96 General Appropriations Act was language that stated: "This section takes effect upon approval of this act by the Governor, but shall be void and of no effect if the United States Supreme Court issues a ruling which reverses the holding in *U.S. v. Commonwealth of Virginia*, 44 F.3d 1229, 1232, 1238 (4th Cir. 1995)." Journal of the Senate of the State of South Carolina, No. 67 (May 4, 1995).

Thereafter, an agreement was entered into in June of 1995 between the State of South Carolina and Converse College establishing SCIL. South Carolina desired to establish a state-supported leadership institute for women. Converse College desired to offer a state-supported leadership institute as part of the leadership program available to its undergraduate students.

The mission of SCIL is to prepare women, as The Citadel mission prepares men, "for post-graduate positions of leadership through academic programs of excellence"

supported by an environment that fosters the "growth and development of character, physical fitness, moral and spiritual principles, thereby preparing its students to meet the requirements of citizens and especially of leaders." South Carolina's Proposed Remedial Plan.

SCIL was designed by experts in higher education, who concentrate on women's education and development, to provide college-age women the benefits of single-gender education, discipline, and leadership training that The Citadel provides to college-age men.[2] SCIL's mission and goals parallel those of The Citadel. As with The Citadel,

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[2] Students who are enrolled in SCIL must complete the academic undergraduate program at Converse College, plus complete a total of four courses in science, eight courses in health and physical education, and calculus. Additionally, the students must complement their academic program by required ROTC participation, which includes summer experiences and special residential lief program requirements. Further, SCIL students complete a twenty-one semester hour sequence of academic courses called the Converse Leadership Program.

single-gender education forms the core of the SCIL experience.

The enrollment of SCIL for the 1995-96 academic year includes twenty-two young women, both freshmen and transfer students, who have all exhibited achievement in academic and physical fitness, have exhibited a potential for leadership, and are extremely qualified and capable to meet the demands of SCIL.[3] If given the opportunity, they each have the ability and commitment to successfully complete the program and to be prepared to "meet the requirements of citizens and especially of leaders." South Carolina's Proposed Remedial Plan.

However, if the principle of a publicly funded single-gender educational program for women that is substantively comparable to the publicly funded single-gender educational program for men, is not upheld by this Court as being a

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[3] See Appendix A for detailed descriptions of the twenty-two students who enrolled in SCIL in the fall of 1995.

legitimate governmental objective and constitutional, then the State of South Carolina is released from its obligation to provide funds to Converse College to support SCIL, and Converse College is under no further obligation to continue to operate the program. Agreement between the State of South Carolina and Converse College, June 5, 1995, para. 9. Therefore, what occurs in this review is of utmost importance to the students enrolled in SCIL and to future college-age women in South Carolina who may desire to pursue similar educational experiences.

SUMMARY OF ARGUMENT

Single-gender educational opportunities have been found by the Fourth Circuit Court of Appeals to be beneficial for both men and women. *United States v. Commonwealth of Virginia*, 976 F.2d 890, 897-98 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993) ("VMI I"); *see also United States v. Commonwealth of Virginia*, 44 F.3d

1229, 1239 (4th Cir. 1995), *cert. granted*, 116 S. Ct. 281 (1995) ("VMI II").[4]

In VMI I, Judge Niemeyer found that the evidence in the case "amply demonstrated that single-genderedness in education can be pedagogically justifiable . . . . [W]hile the data support a pedagogical justification for a single-sex education, they do not favor either sex. Both men *and* women appear to have benefitted from a single-sex education in a materially similar manner." VMI I, 976 F.2d at 897-898 (Emphasis in original). In VMI II, the court held "that single-gender education at the college level is beneficial to both sexes is a fact established in this case." VMI II, 44 F.3d at 1238.

The Fourth Circuit Court of Appeals has also held that the single-gender educational programs offered at Virginia Military Institute (VMI) and Virginia Women's Institute for

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[4] For sake of conciseness, cites hereinafter to these two cases will be referred to as VMI I and VMI II.

Leadership (VWIL) pass constitutional scrutiny because, although they are not identical, they are substantively comparable.[5] VMI II, 44 F.3d at 1241.

The Fourth Circuit has further stated, on several occasions, that the principles of VMI I and VMI II apply to the facts of the controversy involving The Citadel and the issue of whether the State of South Carolina's parallel program, SCIL, is substantively comparable to The Citadel's. *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993); *Faulkner v. Jones*, 51 F.3d 440, 447, 448 (4th Cir. 1995).

Consequently, the ruling of this Court on the writ of certiorari before it not only affects the concept of single-

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[5] The court qualified this holding by stating that the VWIL program, which at that time was at its incipiency, be undertaken with a persistently high level of commitment by the State of Virginia. VMI II, 44 F.3d at 1241. Since that decision was rendered on January 26, 1995, both VWIL at Mary Baldwin College and SCIL at Converse College are proving to be successful single-gender educational programs.

gender education in the State of Virginia and the State's right to designate it as an important governmental objective, but also directly affects and controls the existence and continuation of publicly supported single-gender education in South Carolina that exists for both sexes.

The reversal of VMI II would undermine and threaten the rights of young women to choose to participate in a unique single-gender educational experience that is provided to young men in South Carolina. Despite the fact that the State of South Carolina has enthusiastically come forward to establish a publicly funded single-gender educational opportunity for its young women, if the concept of a constitutionally permissible, substantively comparable alternative is not approved, that opportunity will cease to exist.

ARGUMENT

A. SINGLE-GENDER EDUCATION IS BENEFICIAL TO BOTH SEXES AND PUBLIC SUPPORT OF SINGLE-GENDER EDUCATIONAL PROGRAMS CONSTITUTES A LEGITIMATE AND IMPORTANT GOVERNMENTAL OBJECTIVE.

Petitioner and amici curiae filing briefs in support of petitioner's argument that substantively comparable educational programs are unconstitutional would have this Court ignore the well-reasoned analysis of the district court and the court of appeals and find a constitutional violation where in fact one does not exist. A review of the arguments of the petitioner and the supportive amici curiae do nothing more than establish that the groups are fundamentally opposed to the concept that single-gender education is beneficial and public support of it is justifiable. As an example, the amici brief filed in support of petitioner by twenty-six private women's colleges begins its analysis with an endorsement of single-gender education (Brief of Twenty-Six Private Women's Colleges as Amici

Curiae in Support of Petitioner at 2-3), yet concludes that only *private* single-gender education is beneficial and VMI II, which held that single-gender education can constitute a legitimate governmental objective, should be reversed.

Beginning with Judge Kiser's opinion in *United States v. Commonwealth of Virginia*, 766 F. Supp. 1407 (W.D. Va. 1991), the District Court of the Western District of Virginia and the Fourth Circuit Court of Appeals have carefully considered the evidence presented with regard to the benefits of single-gender education and have concluded that single-gender education at the college level is beneficial to both sexes and that the option of a publicly supported single-gender college education may be given to the citizens by a state. VMI II, 44 F.3d at 1239.

> Just as a state's provision of publicly financed education to its citizens is a legitimate and important governmental objective, so too is a state's opting for single-gender education as one particular pedagogical technique among many. Although there remains some disagreement among the experts about the extent of the

> benefits of single-gender education, it is not our role to resolve that issue. It is enough that there is a growing consensus in the professional community that a sexually homogeneous environment yields concrete educational benefits. Thus, we should defer to a state's selection of educational techniques when we conclude, as we do here, that the purpose of providing single-gender education is not pernicious and falls within the range of the traditional governmental objective of providing citizens higher education.

Id. at 1239.

The court below has carefully considered the constitutionality of publicly supported single-gender education and has found that substantively comparable programs provide opportunities for men and women that pass Equal Protection Clause constitutional scrutiny.

The State of Virginia chose to provide a "parallel program" at Mary Baldwin College in Staunton, Virginia, and therefore to establish the Virginia Women's Institute for Leadership. The district court subsequently reviewed the plan and approved it. *United States v. Commonwealth of Virginia*, 852 F. Supp. 471 (W.D. Va. 1994). The

Fourth Circuit Court of Appeals then affirmed the district court's decision by review of the plan pursuant to a modified constitutional scrutiny test peculiar to this case. *See, e.g., Craig v. Boren*, 429 U.S. 451 (1976).

> Application of this traditional test . . . to a case where the classification is not directed per se at men or women, but at homogeneity of gender, presents a unique problem, because once the state's objective is found to be an important one, the classification by gender is by definition necessary for accomplishing the objective and might thereby bypass any equal protection scrutiny. The second prong of the test thus would provide little or no scrutiny of the effect of a classification directed at homogeneity of gender. Thus, in order to measure the legitimacy of a classification based on homogeneity of gender against the Equal Protection Clause, we conclude that we must take the additional step of carefully weighing the alternatives available to members of each gender denied benefits by the classification.

VMI II, 44 F.3d at 1237. In other words, the Fourth Circuit Court of Appeals strove to determine whether "excluded men and excluded women have reasonable opportunities to obtain benefits substantively comparable to

those they are denied." *Id.* at 1239-1240. The court ultimately concluded that Virginia's plan provided "to both genders benefits comparable in substance, but not in form and detail." *Id.* at 1240. These substantively comparable benefits have been found to be constitutional and not to violate the Equal Protection Clause, and the court's finding on this issue should be affirmed.

The dissent in VMI II roundly criticized the majority's conclusion, as have petitioner and amici curiae in support of petitioner. Focusing on the "substantial relationship prong" of the intermediate scrutiny test, the dissent essentially agreed with the majority by saying that:

> no such arrangement (of separate single-gender schools) could be found *substantially related* to any conceivable governmental objective unless the benefits to be separately distributed by the arrangement were *substantively* equal across the board of the relevant criteria for evaluating educational institutions.

VMI II, 44 F.3d at 1249 (Phillips, J., dissenting). The dissent then attacked the criteria used by the majority,

however, saying it should have employed the standard enunciated in *Sweatt v. Painter*, 339 U.S. 629, 633-634 (1950) (requiring "substantial equality in educational opportunities" to justify separate state-supported law schools for white and black students, and not finding it upon considering both tangible resources such as "scope of library" and intangible resources such as "position and influence of the alumni," "traditions and prestige"). The rationale for using this criteria, the dissent claimed, is that "the proper perspective from which to measure substantial equality of available benefits is that of the potential student who *could* be admitted to either school and has a choice." VMI II, 44 F.3d at 1249 (Phillips, J., dissenting). Thus, the dissent concluded that VWIL can never provide "substantially equal" benefits as VMI provides because it was not started at the same time, it does not have the same prestige, alumni network, etc. Indeed, the dissent then offered as a "paradigm" for compliance with such a standard:

> simultaneously opened single-gender undergraduate institutions having substantially comparable curricular and extra-curricular programs, funding, physical plant, administration and support services, and faculty and library resources. Such an arrangement would involve no gender-line discrimination in terms of tangible benefits, nor of intangible benefits such as tradition, prestige and alumni influence -- as to which each starts with none.

Id. at 1250.

The flaws in the dissent's logic are numerous. First, *Sweatt v. Painter* addresses racial discrimination, not gender discrimination, and thus the classification at issue in that case was subject to the most exacting type of scrutiny -- strict scrutiny. Though the dissent recognized this fact, it merely brushed that consideration aside saying "I see no reason why the same requirement of *substantial* equality of benefits that was thought at one time to justify separate-but-equal schools for the different races should not apply to separate schools for men and women if that classification now does, as race formerly but no longer does, permit

separate-but-equal arrangements." VMI II, 44 F.3d at 1249 (Phillips, J., dissenting)(emphasis in original).

The dissent in VMI II and the arguments of petitioner and supporting amici curiae urge this Court to reject the reasoned Fourth Circuit analysis and find that the single-gender educational programs that exist at VMI and VWIL violate the Equal Protection Clause. These arguments are not based on the law of this Court and should be rejected.

B. THE PRINCIPLES OF VMI I AND VMI II AND THEIR PRECEDENTIAL VALUE HAVE BROAD IMPLICATIONS FOR OTHER INSTITUTIONS OF HIGHER LEARNING AND THE STUDENTS WHO ARE ENROLLED IN THEM, AND THESE IMPLICATIONS SHOULD BE CONSIDERED BY THIS COURT.

It is undisputed that similarities exist between the issues addressed in the VMI litigation and issues that exist in The Citadel litigation. The Fourth Circuit Court of Appeals has stated in at least two decisions that the VMI principles of law were controlling in The Citadel litigation. *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993);

Faulkner v. Jones, 51 F.3d 440, 447, 448 (4th Cir. 1995). The parties and the Court in The Citadel litigation have agreed that due to the similarities certain VMI conclusions of law would apply in The Citadel litigation. *Faulkner v. Jones*, 858 F. Supp. 552, 555 (D.S.C. 1994).

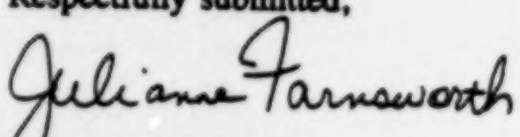
As a result of this overlap of principles and similarity of issues, SCIL, as amicus curiae in this case, submits to the Court that the implications of this decision are broad and far reaching and not only will dictate the course of events for present and future students of VMI and VWIL, but also for other young men and women across the country. Just as Nancy Mellette, in her amicus brief supporting the petitioner, asserts that she has a "very substantial" interest in the outcome of the Court's review of the VMI decision (Amicus Brief of Nancy Mellette in Support of Petitioner at 1), the twenty-two SCIL students assert that they have an even stronger interest than Nancy Mellette or the other amici curiae who filed briefs in

support of the reversal of the VMI II decision in the outcome of this Court's review of this case. The twenty-two SCIL students, unlike Nancy Mellette, or Lieutenant Colonel Rhonda Cornum, USA, or the American Association of University Professors, are not prospective participants, past participants, or interested observers in an educational program, but are actual participants in an on-going educational program whose continued existence depends specifically on whether this Court affirms the VMI II holding that substantively comparable single-gender educational programs are constitutionally permissible. Consequently, due to the overlap of the controlling legal principles and the extremely substantial interest these twenty-two students at SCIL have in this case, this amicus curiae respectfully urges the Court to affirm the findings of VMI II.

CONCLUSION

For the reasons stated in this brief, amicus curiae South Carolina Institute of Leadership for Women requests that this Court affirm the judgment of the court of appeals.

Respectfully submitted,



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Attorney for Amicus Curiae

December 15, 1995

South Carolina Institute of Leadership for Women

1995-96 Student Profiles

Bhatty, Komilla
Birthplace: India
Boarding, Transfer, Full-time
Languages Spoken: English, Urdu, Punjabi, Hindi
Activities: Athletics, Writing, Peer-tutoring

Burgess, Rachel Elizabeth
Birthplace: Greenville, South Carolina
Boarding, Freshman, Full-time
Languages Spoken: English
Activities: Art, Religion, Athletics, Beta Club, FCA

Burgess, Robin Melanie
Birthplace: Chester, South Carolina
Boarding, Freshman, Full-time
Languages Spoken: English
Activities: Beta Club, Junior Palmetto Leadership, Peer Leaders, Band, Youth Group, Teen Institute, TH-M, Church Choir, Rainbow, Spanish Club

Choice, Sharaiah Octavia
Birthplace: Charleston, South Carolina
Boarding, Freshman, Full-time
Languages Spoken: English, French
Activities: Beta Club, Student Government, Yearbook, Science Club, Who's Who Among American High School Students, Cheerleader, Athletics, Choir

Dansby, Nakia
Birthplace: Spartanburg, South Carolina
Boarding, Junior, Full-time
Languages Spoken: English

Eller, Evelyn Athena
Birthplace: Spartanburg, South Carolina
Boarding, Transfer, Full-time
Languages Spoken: English

Flowe, Chelsea Lynne
Birthplace: Huntington Beach, California
Boarding, Freshman, Full-time
Languages Spoken: English
Activities: Student Council, Academic Decathlon, Band/Orchestra, California Scholarship Federation, Physics Club, Octagon Club, Swim Team

Grant, Meryl Sydney
Birthplace: Charleston, South Carolina
Boarding, Freshman, Full-time
Languages Spoken: English
Activities: Band, Girl Scouts, Junior Classical League, Interact

Hall, Kimberly Rochelle
Birthplace: Winnsboro, South Carolina
Boarding, Freshman, Full-time
Languages Spoken: English
Activities: Beta Club, National Honor Society, Academic Challenge Team, Library Club, Science Club, Social Studies Club

Hammond, Kelly Christina "K.C."
Birthplace: Charlotte, North Carolina
Boarding, Freshman, Full-time
Languages Spoken: English
Activities: Concert Choir, Show Choir, Madrigals, Jazz Singers, Symphonic Band, Marching Band, Church Youth Choir, Church Youth Group, National Junior Honor Society, Governor's School for the Arts, Student Council, Beta Club

Kennerty, Rachel Kathleen
Birthplace: Charleston, South Carolina
Boarding, Freshman, Full-time
Languages Spoken: English
Activities: Yearbook, Mock Trial Team, Varsity Soccer, Bible Club, Band, Teacher Cadet, Senior Board, Prom Committee, Senior Spirit Club

Krueger, Katherine Skye
Birthplace: Spartanburg, South Carolina
Boarding, Freshman, Full-time
Languages Spoken: English, German
Activities: Church Group, Red Cross, Dancing, Interact, Athletics, National Honor Society, 1993 Who's Who Among American High School Students, 1996 American Achievement Academy

McIsaac, Olivia
Birthplace: Kershaw, South Carolina
Boarding, Sophomore, Full-time
Languages Spoken: English
Activities: Fellowship of Christian Athletes, Student Government Association

Neal, Katherine Elise
Birthplace: Ohio
Boarding, Freshman, Full-time
Languages Spoken: English
Activities: Athletics, Concert Band, Junior Civitan, Student Council, Beta Club, AP Chemical Illusions Group, United Way of the Piedmont Youth Advisory Council, Athletic Booster, US Junior Olympic Volleyball Team

Pierce, Marjorie Dawn
Birthplace: North Charleston, South Carolina
Boarding, Freshman, Full-time
Languages Spoken: English
Activities: FHA, Church Chorus, Basketball, Softball, Humanities, Spanish Club

Roland, Rebecca Elizabeth
Birthplace: Columbia, South Carolina
Boarding, Freshman, Full-time
Languages Spoken: English
Activities: Theater, Athletics, Cheerleader, Pep Club, FCA

Thompson, Cassie
Birthplace: Fort Mill, South Carolina
Boarding, Junior, Full-time
Languages Spoken: English

Toussaint, Mary Ann
Birthplace: Alabama
Boarding, Freshman, Full-time
Languages Spoken: English
Activities: ROTC, Latin Honor's Society, Honor Society, Foreign Exchange Student, Horseback Riding

Whitesides, Kelly Elizabeth
Birthplace: Auburn, Alabama
Boarding, Freshman, Full-time
Activities: Interact, Varsity Cheerleading, Yearbook, Senior Superlative Recipient

Whitmore, Janet Brooke
Birthplace: Florida
Boarding, Transfer, Full-time
Activities: Yearbook, Student Council, Spanish Club, Clarinet, Soccer, National Honor Society

Woodall, Charis Marie
Birthplace: Anderson, Indiana
Boarding, Freshman, Full-time
Languages Spoken: English
Activities: County Orchestra, Community Service Gardening Club Zoo Magnet Program, National Honor Society, French National Honor Society, Key Club, French Club, French Award, Music Theory Award, American Government Citizenship Award, Orchestra Award, AB Honor Roll Freshman, Sophomore and Junior Years

Woodward, Anzer Michelle
Birthplace: Charleston, South Carolina
Boarding, Freshman, Full-time
Languages Spoken: English
Activities:Student Council, Key Club, African-American Society, DAFY (Drug, Alcohol-Free Youths), County Conservatory Oratory Awards

(15) (18)

Nos. 94-1941 and 94-2107

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA, ET AL.,
Respondents.

COMMONWEALTH OF VIRGINIA, ET AL.,
Cross-Petitioners,

v.

UNITED STATES OF AMERICA,
Cross-Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF TWENTY-SIX PRIVATE WOMEN'S COLLEGES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER*

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November 16, 1995

36 pp

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Brenau Women's College (GA)
Chatham College (PA)
Chestnut Hill College (PA)
College of St. Benedict (MN)
College of St. Catherine (MN)
College of St. Elizabeth (NJ)
College of St. Mary (NE)
Columbia College (SC)
Hartford College for Women (CT)
Lesley College (MA)
Marymount College-Tarrytown (NY)
Midway College (KY)
Mount St. Mary's College (CA)
Mount Vernon College (D.C.)
Notre Dame College of Ohio
Pine Manor College (PA)
Russell Sage College (NY)
St. Mary's College (IN)
St. Mary-of-the-Woods College (IN)
Seton Hill College (PA)
Spelman College (GA)
Trinity College (D.C.)
Trinity College of Vermont
Ursuline College (OH)
Wilson College (PA)

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICI CURIAE*	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. *VMI II* Should Be Reversed Because the All-Male Public Military College, and Its Parallel "VWIL" Program, Fail the Test of *Mississippi University for Women* v. *Hogan*	5
A. A Single-Gender Public College May Not Rely on Stereotyped Generalizations about Men and Women in Justifying Its Admissions Policy	5
B. The Remedy Proposed by VMI Violates the Equal Protection Clause Because it Justifies Differential Treatment of Men and Women with Reference to Gender-Based Stereotypes	10
II. The Reversal of *VMI II* Would Not Undermine or Threaten the Maintenance of Private Women's Colleges	13
A. The Equal Protection Clause Does Not Apply to Private Single-Gender Colleges and Universities	13

TABLE OF CONTENTS--Continued

Page

B. The Tax-Exempt Status of Private Women's Colleges Is Not Threatened by the Public Policy Requirement Enunciated in *Bob Jones University* v. *United States* 20

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES:

Ben-Yonatan v. *Concordia College Corp.*, 863 F. Supp. 983 (D. Minn. 1994) .. 17, 18

Berrios v. *Inter American Univ.*, 535 F.2d 1330 (1st Cir. 1976) 16, 17, 18

Blackburn v. *Fisk Univ.*, 443 F.2d 121 (6th Cir. 1971) 17, 18

Blouin v. *Loyola Univ.*, 506 F.2d 20 (5th Cir. 1975) 17, 18

Blum v. *Yaretsky*, 457 U.S. 991 (1982) 15, 18

Board of Trustees for Vincennes Univ. v. *Indiana*, 55 U.S. (14 How.) 268 (1852) 14

Bob Jones University v. *United States*, 461 U.S. 574 (1983) ..... *passim*

Braden v. *University of Pittsburgh*, 552 F.2d 948 (3d Cir. 1977) 14

Brown v. *Board of Education*, 347 U.S. 43 (1954) 10

Browns v. *Mitchell*, 409 F.2d 593 (10th Cir. 1969) 18

TABLE OF AUTHORITIES--Continued

Page

Burton v. *Wilmington Parking Auth.*, 365 U.S. 715 (1961) 16

Civil Rights Cases, 109 U.S. 3 (1883) 13

Cohen v. *Illinois Inst. of Technology*, 524 F.2d 818 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976) 17, 18

Evans v. *Newton*, 382 U.S. 296 (1966) 15

Fischer v. *Driscoll*, 546 F. Supp. 861 (E.D. Pa. 1982) 18

Gonyo v. *Drake Univ.*, 879 F. Supp. 1000 (S.D. Iowa 1995) 18

Greenya v. *George Washington Univ.*, 512 F.2d 556 (D.C. Cir.), *cert. denied*, 423 U.S. 995 (1975) 18, 19

Grossner v. *Trustees of Columbia Univ.*, 287 F. Supp. 535 (S.D.N.Y. 1968) 18, 19

Imperiale v. *Hahnemann University*, 776 F. Supp. 189 (E.D. Pa. 1991), *aff'd*, 966 F.2d 125 (3d Cir. 1992) 19

Jackson v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974) 15

J.E.B. v. *Alabama*, 114 S. Ct. 1419 (1994) 12

TABLE OF AUTHORITIES--Continued

Page

Krohn v. *Harvard Law School*, 552 F.2d 21 (1st Cir. 1977) 17, 18

Lorentzen v. *Boston College*, 440 F. Supp. 464 (D. Mass. 1977), *aff'd*, 577 F.2d 720 (1st Cir. 1978), *cert. denied*, 440 U.S. 924 (1979) 18

Lugar v. *Edmondson Oil Co.*, 457 U.S. 922 (1982) 14, 15, 16, 20

McKeesport Hosp. v. *Accreditation Council*, 24 F.3d 519 (3d Cir. 1994) 16, 18

Mississippi University for Women v. *Hogan*, 458 U.S. 718 (1982) ..... *passim*

Moose Lodge No. 107 v. *Irvis*, 407 U.S. 163 (1972) 18

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Pime v. *Loyola Univ. of Chicago*, 803 F.2d 351 (7th Cir. 1986) 14

Powe v. *Miles*, 407 F.2d 73 (2d Cir. 1968) 17, 18

TABLE OF AUTHORITIES--Continued

Page

Prince Edward School Found. v. *Commissioner*, 478 F. Supp. 107 (D.D.C. 1979), *aff'd mem.* (D.C. Cir. 1980), *cert. denied*, 450 U.S. 44 (1981) 22, 23

Rendell-Baker v. *Kohn*, 457 U.S. 830 (1982) 14, 15, 17, 18, 19

Shelley v. *Kraemer*, 334 U.S. 1 (1948) 13

Stone v. *Dartmouth College*, 682 F. Supp. 106 (D.N.H. 1988) 16, 18

Sweatt v. *Painter*, 339 U.S. 629 (1950) 11

Trustees of Dartmouth College v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819) 14

United States v. *Virginia*, 976 F.2d 890 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 2431 (1993) 4, 9, 10, 13

United States v. *Virginia*, 44 F.3d 1229 (4th Cir.), *cert. granted*, 64 U.S.L.W. 3267 (Oct. 5, 1995) . . . . . *passim*

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TABLE OF AUTHORITIES--Continued

Page

Yeager v. *City of McGregor*, 980 F.2d 337 (5th Cir.), *cert. denied*, 114 S. Ct. 79 (1993) 16, 18

CONSTITUTION:

U.S. Const. amend. XIV 5

STATUTES:

Education Amendments of 1972, tit. IX:

20 U.S.C. § 1681 *et seq.* 24
20 U.S.C. § 1681(a)(1) 24
20 U.S.C. § 1681(a)(5) 24

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TABLE OF AUTHORITIES--Continued

Page

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Sup. Ct. R. 37.3 1

M. Elizabeth Tidball, *Baccalaureate Origins of Entrance into American Medical Schools*, 57 Journal of Higher Education (1986) 3

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

Nos. 94-1941 and 94-2107

UNITED STATES OF AMERICA,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA, *ET AL.*,

Respondents.

COMMONWEALTH OF VIRGINIA, *ET AL.*,

Cross-Petitioners,

v.

UNITED STATES OF AMERICA,

Cross-Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICI CURIAE*

The twenty-six undersigned private women's colleges submit this brief as *amici curiae*, urging reversal of the decision of the court of appeals.[1]

These are all private women's colleges whose mission is to increase educational opportunities for women. The colleges have found, through their various activities and experiences, that women's colleges are particularly effective in preparing women for the many roles they will assume in life. Women's colleges offer an excellent academic education, challenge women to realize their full potential, and connect women into networks that will serve them during the course of their professional and personal lives. Single-gender education for women greatly increases the chances that a woman will succeed academically, pursue a career in a field traditionally associated with men, or assume a leadership role in society.

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[1] The colleges signatory to this brief are: Bennett College (NC) Brenau Women's College (GA), Notre Dame College of Ohio, Chatham College (PA), Chestnut Hill College (PA), Pine Manor College (PA), College of St. Benedict (MN), Russell Sage College (NY), College of St. Catherine (MN), St. Mary's College (IN), College of St. Elizabeth (NJ), Seton Hill College (PA), College of St. Mary (NE), Spelman College (GA), Columbia College (SC), Trinity College (D.C.), Lesley College (MA), Trinity College of Vermont, Marymount College-Tarrytown (NY), Ursuline College (OH), Midway College (KY), Wilson College (PA), Mount St. Mary's College (CA), Mount Vernon College (D.C.), Hartford College for Women (CT), St. Mary-of-the-Woods College (IN). Pursuant to Rule 37.3 of the Rules of this Court, these colleges have filed with the Clerk the written consents of the parties in this case to the submission of this *amici curiae* brief.

According to literature compiled by an organization of women's colleges, 30% of the 50 women recognized as rising stars in corporate America by *Business Week* received their baccalaureate degree from a women's college. One-third of the women board members of the 1992 Fortune 1000 companies are women's college graduates. Of 54 women in Congress, 13 attended women's colleges. One of every seven women cabinet members in state government attended a women's college. Nearly three-quarters of all women's college graduates are in the work force, and almost half of those graduates hold traditionally male-dominated jobs, at the higher end of the pay scale, such as lawyer, physician or manager. Women's College Coalition, *A Profile of Recent College Graduates* (1993). In short, as summarized by Elizabeth Tidball, a pioneer in the field of evaluating the productivity of academic institutions with respect to women in science:

> "Graduates of women's colleges are more than twice as likely as graduates of coeducational colleges to receive doctorate degrees, and to enter medical school and receive doctorates in the natural sciences." M. Elizabeth Tidball, *Baccalaureate Origins of Entrance into American Medical Schools*, 57 Journal of Higher Education (1986).

The literature is persuasive that the intellectual development of women is enhanced when they have, at least, a few years to learn and study with each other in a single-gender environment. See, *e.g.*, Women's College Coalition, *A Profile of Recent College Graduates* (1993).

As a result of these colleges' focus on the benefits and promotion of single-gender higher education for women, they are particularly interested in this litigation involving the

Constitutionality of the all-male admissions policy of Virginia Military Institute ("VMI"). They submit the *amici* brief in this case not because they believe that a ruling here will have an impact on their own admissions policies, but in order to make clear that the result in this case would not have any such effect. VMI is a public institution; it has an admissions policy that limits enrollment to men; and it has a mission that perpetuates the traditional stereotype of men as soldiers, who learn from adversity, while women need "cooperative confidence building program[s]." *United States v. Virginia*, 44 F.3d 1229, 1234 (4th Cir.), *cert. granted*, 164 U.S.L.W. 3267 (Oct. 5, 1995). For all these reasons, the decision below, which provides that VMI may maintain its public status while continuing to exclude women applicants, should be reversed. A ruling that VMI cannot remain a public, all-male institution, however, does not in any way suggest that private women's colleges cannot continue to provide single-gender educational opportunities for women who choose to attend these institutions.

SUMMARY OF ARGUMENT

This case comes to this Court with a long history. In *United States v. Virginia*, 976 F.2d 890 (4th Cir. 1992) *("VMI I")*, *cert. denied*, 113 S. Ct. 2431 (1993), the court of appeals held that VMI's exclusion of women violated the Equal Protection Clause of the Fourteenth Amendment, and remanded the case to permit VMI to remedy this Constitutional violation. VMI could have chosen to open its doors to women - as have the U.S. military academies -or, as suggested by *VMI I*, to become a private college. Instead, VMI opted to create a separate and different leadership program for women, a program with a concededly different educational philosophy and disparate academic plan -- a program that lacked the tradition and stature of VMI. The

court of appeals approved this separate program in *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995) *("VMI II")*.

In this Court, the Commonwealth of Virginia now challenges the initial determination that VMI's male-only admissions policy violates the Equal Protection Clause. The United States, on the other hand, seeks reversal of the decision to accept the VMI remedial plan. As we show below, the *VMI I* court correctly concluded that VMI's all-male admissions policy was unconstitutional, while in the *VMI II* Court erroneously ruled that the VMI remedy passed constitutional muster. Accordingly, *VMI II* should be reversed. It should be reversed because, under the Equal Protection Clause, a public institution cannot predicate its admissions policies on impermissible sexual stereotypes. For this reason, reversing *VMI II* would not impair the continued viability of private women's colleges. Such private institutions, unlike VMI, are not instrumentalities of the State, and operate to dissipate, rather than perpetuate, traditional gender classifications.

ARGUMENT

I. *VMI II* SHOULD BE REVERSED BECAUSE THE ALL-MALE PUBLIC MILITARY COLLEGE AND ITS PARALLEL "VWIL" PROGRAM, FAIL THE TEST OF *MISSISSIPPI UNIVERSITY FOR WOMEN v. HOGAN*.

A. A Single-Gender Public College May Not Rely on Stereotyped Generalizations about Men and Women in Justifying its Admissions Policy.

In *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), this Court addressed the Constitutionality under

the Equal Protection Clause of the Fourteenth Amendment of "a state statute that exclude[d] males from enrolling in a state-supported professional nursing school." *Id.* at 719. As the Court there made clear, that case presented a "narrow issue," limited to the Constitutionality of a single-gender admissions policy that (l) was maintained by a state-supported university, and (2) excluded men from a nursing program. *Id.* Indeed, the Court explicitly left open in *Hogan* the question of whether excluding males from other programs at the University would violate the Fourteenth Amendment. *Id.* at 723 n.7.

Nevertheless, while the decision in *Hogan* was tailored to its facts, this Court there articulated the Constitutional standard for reviewing the validity of single-gender admissions policies of public colleges and universities. That standard requires that a party seeking to uphold a statute that classifies individuals on the basis of their gender must show an "'exceedingly persuasive justification'" for the classification. *Id.* at 724 (citation omitted). At the least, this showing is met by demonstrating that "the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Id.* (citation omitted).

The *Hogan* Court went on to emphasize that in order for those objectives to survive Constitutional scrutiny, they must avoid the perpetuation of traditional gender stereotypes:

> "Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects

> archaic and stereotypic notions. Thus, if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate." *Id.* at 724-25 (citation and footnote omitted).

VMI cannot satisfy this Constitutional undertaking. The Commonwealth of Virginia argues that the male-only admissions policy at VMI is justified by the Commonwealth's objective belief in the pedagogical value of a single-gender education and in its legitimate interest in providing a diversity of opportunities in its higher education offerings. Cross-Pet. at 4-5. It further asserts that the policy of limiting VMI admission to only one gender is narrowly tailored to achieving the benefits that a single-gender education provides. *Id.* at 5. Alternatively, it argues that VMI's gender restrictive admissions policy is "directly related to achieving the results of an adversative method in a military environment," because "'the unique characteristics of VMI's program would be destroyed by coeducation.'"[2] *Id.* at 6.

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[2] As the dissent recognized in the decision below, there is reason to question whether any of these purported justifications provide the real basis for the male-only admissions policy. Inquiry into the history and actual purpose of VMI's discriminatory admissions policy and proposed remedial action plan would support the conclusion that the primary and overriding purpose is "not to create a new type of educational opportunity for women, nor to broaden the Commonwealth's educational base for producing a special kind of citizen-soldier leadership, nor to further diversify the Commonwealth's higher education system . . . but is simply by this means to allow VMI to continue to exclude women in order to preserve its historical character and mission as that is perceived and has been primarily defined in this litigation by VMI and directly affiliated parties." *VMI II*, 44 F.3d at 1247 (Phillips, J., dissenting) (footnote omitted). Even if the asserted reasons are credited, however, the policy still fails to pass constitutional muster.

None of these formulations of the justification for providing military training for men and not for women can serve an "important governmental objective." As this Court recognized in *Hogan*, no gender-based classification can be justified on the ground that it provides a benefit or choice not available to the other gender. *Id.* at 731 n.17. In the words of this Court:

> "The issue is not whether the benefitted class profits from the classification, but whether the State's decision to confer a benefit only upon one class by means of a discriminatory classification is substantially related to achieving a legitimate and substantial goal." *Id.*

Thus, VMI's male-only admissions policy cannot be supported on the ground that it provides a "unique" educational opportunity for men or that it offers diversity in educational opportunities, because a State cannot generally have as an important governmental objective the provision of a program to members of only one sex.

This is not to say, as this Court held, that gender-based classifications favoring one sex can never be justified. "In limited circumstances, [such] a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened." *Id.* at 728. Just as the nursing program at Mississippi University for Women could not meet this standard, so the military program at VMI cannot be so justified. Indeed, VMI's policy of excluding women from admission to its military program, and its bases for doing so, expressly perpetuate the stereotyped view that only men are capable of rigorous military training. In short, it could hardly be said that men should be favored in military training as a result of past discrimination in this field.

Finally, VMI makes the argument that homogeneity of gender is, in itself, a legitimate and important governmental objective because it is necessary to "achieving the results of an adversative method in a military environment." Cross-Pet. at 6. In so contending, the Commonwealth has confused means and ends. The Commonwealth cannot contend that using the adversative method is, in itself, an important governmental objective. At best, it can argue that using the adversative method is substantially related to the important government objective of training "citizen-soldiers."[3] But even assuming the Commonwealth has shown that the adversative method is narrowly tailored to the legitimate goal of training citizen soldiers, and that homogeneity of gender is necessary to implement that methodology, the Commonwealth still must justify its decision to provide such training only to those men who desire it and not also to those individual women who share this desire. Moreover, it must do so without relying on stereotypical notions of the proper roles and abilities of men and women or on generalizations about the attitudes or preferences of men or of women as a group. Since the Commonwealth has not made and cannot make such a showing, its decision to deny women the unique benefits of a VMI education available to men cannot survive constitutional scrutiny.

Accordingly, under any of its purported justifications, VMI fails the *Hogan* standard for maintaining single-gender, state-supported colleges and universities.

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[3] This assumption is, itself, subject to considerable debate. VMI's own mission statement defines citizen soldiers as "educated and honorable men who are suited for leadership in civilian life and who can provide military leadership when necessary." *VMI I*, 976 F.2d at 893. By all accounts, the United States military academies have continued to enjoy considerable success in training men and women as "citizen-soldiers" even though they have abandoned the use of the adversative method as a training tool.

B. The Remedy Proposed by VMI Violates the Equal Protection Clause Because it Justifies Differential Treatment of Men and Women with Reference to Gender-Based Stereotypes.

In *VMI I*, the court of appeals found that the failure of the Commonwealth to offer women benefits comparable to those offered to men at VMI constituted a violation of the Equal Protection Clause. The *VMI I* court, however, did not order that VMI become a coeducational college. Rather, it remanded the case to the district court, directing the Commonwealth to formulate, adopt, and implement a remedial plan. The remedial plan for the equal protection violation offered by the Commonwealth, and later affirmed by the court of appeals in *VMI II*, was to create a separate single-gender, state-supported leadership training institute (the "Virginia Women's Institute for Leadership" or "VWIL") at Mary Baldwin College for women seeking to be trained as "citizen-soldiers." This program, all parties agree, shuns the adversative method of education and relies, instead, on educational and social methodologies wholly different from those used at VMI.

This remedial plan, however, fails to rectify the Constitutional infirmity of the Commonwealth's single-gender admissions policy at VMI. This Court has never ruled on the Constitutionality of separate but equal educational facilities for men and women, having soundly rejected the propriety of such sepa
rate education in the context of race.[4] However, when separate educational facilities for the races were tolerated, they were permitted if and only if they were substantially

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[4] See *Brown* v. *Board of Education*, 347 U.S. 483, 495 (1954) ("Separate educational facilities are inherently unequal.").

equal on all relevant tangible and intangible criteria by which educational institutions are evaluated. See, *e.g.*, *Sweatt v. Painter*, 339 U.S. 629, 633-34 (1950) (finding separate state-supported law schools for blacks and whites intolerable where tangible resources such as library size and intangible resources such as position and influence of alumni and prestige were not substantially equivalent).

In this case, it is clear that requiring women who seek training as "citizen-soldiers" to attend the VWIL, while permitting men who seek such training to attend VMI, does not treat men and women substantially equally. The VWIL falls far short of VMI in its breadth of curricular offerings, endowment, reputation, facilities, strength of alumni networks, and prestige. As Judge Phillips concluded in his dissenting opinion in *VMI II*:

> "[T]he contrast between [VMI and the VWIL] on all the relevant tangible and intangible criteria is so palpable as not to require detailed recitation. If every good thing projected for the VWIL program is realized in reasonably foreseeable time, it will necessarily be then but a pale shadow of VMI in terms of the great bulk, if not all of those criteria." *VMI II*, 44 F.3d at 1250 (Phillips, J., dissenting).

Moreover, whether or not this Court were to hold the "separate but equal" jurisprudence to be applicable to the maintenance of single-gender education, it is conceded here that under the proposed remedial plan, men and women will be treated differently. Specifically, while VMI will continue to provide men the opportunity to receive a state-supported military style education using the adversative method, the very tool that the Commonwealth has represented to be essential to achieving VMI's leadership training goals,

women admitted to the VWIL will not enjoy that opportunity to develop the same leadership skills and to receive the same educational benefits.

As the *Hogan* Court made clear, in order for this disparity in treatment between men and women to survive equal protection scrutiny, it must be supported with an "exceedingly persuasive justification." In this case, however, the only justification that the Commonwealth has offered to explain this disparity eviscerates this Court's equal protection authority by incorporating and relying on the very gender stereotyping that this Court's jurisprudence forbids. Thus, the Commonwealth asserted, and the court of appeals affirmed, that the decision not to offer a VMI style education at the VWIL was motivated by the belief that "aspects of VMI's military model, especially the adversative method, would not be effective for women as a group, even though . . . some women would be suited to and interested in experiencing a 'women's VMI.'" *VMI II*, 44 F.3d at 1233-34. This group perception of women is precisely what the Constitution rejects. As Justice Kennedy recently explained in his concurring opinion in *J.E.B. v. Alabama*, 114 S. Ct. 1419, 1434 (1994):

> "The neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups . . . . 'At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial [or] sexual . . . class.'"

Consequently, in relying on assumptions about women as a group, while acknowledging that individual women may behave differently than the stereotyped model predicts, the

court of appeals below erroneously approved the VMI remedial plan, and its decision should be reversed.

II. THE REVERSAL OF *VMI II* WOULD NOT UNDERMINE OR THREATEN THE MAINTENANCE OF PRIVATE WOMEN'S COLLEGES.

In *VMI I*, the court of appeals, recognizing that VMI's male-only admissions policy violated the Equal Protection Clause, directed the Commonwealth to develop and implement a solution to remedy the equal protection violation. Three options were presented. The court held that Virginia "might properly decide to admit women to VMI and adjust the program to implement that choice, or it might establish parallel institutions or parallel programs, or it might abandon state support of VMI, leaving VMI the option to pursue its own policies as a private institution." *VMI I*, 976 F.2d at 900. As demonstrated above, the development of parallel institutions or programs failed to pass constitutional muster. As we show below, the third option -- going private -- could have provided a remedy.

A. The Equal Protection Clause Does Not Apply to Private Single-Gender Colleges and Universities.

That the Fourteenth Amendment "erects no shield against merely private conduct" and inhibits "only such action as may fairly be said to be that of the States" are principles that have been "embedded in our constitutional law" since 1883. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948) (referring to the *Civil Rights Cases*, 109 U.S. 3 (1883)). Equal protection jurisprudence since that time has established that the application of the Equal Protection Clause to actions taken by educational institutions depends, first, on whether the

institutional actor is "private," and second, on whether the action taken by the institution may "be fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

The factors that determine whether a college or university is public or private are well-settled by this Court. See *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819). In *Dartmouth College*, this Court found that neither the national interest in education nor New Hampshire's incorporation of the college transformed Dartmouth into a public entity. Rather, the college's charter established its status as a private educational institution by demonstrating that the college was founded by a private citizen, funded through a private endowment, and governed by a privately appointed board of trustees. The features that led the Court to conclude that Dartmouth was a private institution -- its origin, its sources of financial support, and its governing structure -- remain the hallmarks of private colleges and universities today.[5]

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[5] See *Rendell-Baker v. Kohn*, 457 U.S. 830, 831-32 (1982) (school was founded as a private institution, incorporated as a nonprofit entity, located on private property, and governed by a private board of directors who were not selected by public officials); *Board of Trustees for Vincennes Univ. v. Indiana*, 55 U.S. (14 How.) 268, 276-77 (1852) (college that was governed by a privately appointed board of trustees was not a public institution, subject to the state's control, even though it was located on land donated by Congress to be held in trust by the State for the creation of an educational institution; *Pime v. Loyola Univ. of Chicago*, 803 F.2d 351, 352, 357 (7th Cir. 1986) (university was founded by religious order, incorporated as a nonprofit entity, and governed by a president and private board of trustees, a specified number of whom were required to be members of the founding order) (Posner, C.J., concurring). *Cf., Braden v. University of Pittsburgh*, 552 F.2d 948, 959-61 (3d Cir. 1977) (former private university was transformed into "state-related institution" as a result of legislative "'comprehensive restructuring'" of the university that granted elected officials the power to

(continued...)

The recognition of a college or university as private, however, may not completely shield it from application of the Equal Protection Clause. Where the State "has exercised coercive power or has provided such significant encouragement, either overt or covert" over the suspect action of the institution, that action may be deemed "state action," subject to the requirements of the Fourteenth Amendment. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

This Court has enunciated various tests or factors for determining whether a particular action taken by a private institution constitutes state action. *Edmondson Oil*, 457 U.S. at 939. For example, the "public function" test asks whether the State has endowed "private individuals or groups . . . with powers or functions [that are] governmental in nature," such that the private groups act as "agencies or instrumentalities of the State" itself. *Evans v. Newton*, 382 U.S. 296, 299 (1966) (maintenance of white-only city park under private trusteeship involved State action). The "close nexus" test looks at the link between the particular challenged action and the State to see if the challenged action is "compelled" or "influenced" by the State. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350-51 (1974) (state action not established when State regulation of a public utility was unrelated to employee termination); *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982) (state action not established when State and local regulation of private high school was not related to teacher's dismissal). The "symbiotic relationship" test directs attention to the "interdependence" between the private entity and the State to examine whether the State has "place[d] its power,

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[5] (...continued)
appoint trustees and name certain public officials as *ex officio* trustees, gave the state widespread regulatory control over all fiscal matters and management, and dedicated public monies to support the university).

property and prestige" behind the challenged action. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (racially discriminatory service of restaurant located in publicly owned and operated parking garage constituted State action). Whether these "tests are actually different in operation or simply different ways of characterizing the . . . inquiry" in different factual circumstances, they all seek to distinguish routine involvement by the State in the affairs of a private entity from involvement that constitutes the "something more" necessary to convert the private entities' action into that of the State. *Edmondson Oil*, 457 U.S. at 939.

Regardless of which state action test is applied in a given case, the Court has encouraged "[c]areful adherence" to the state action requirement. *Edmondson Oil*, 457 U.S. at 936. That advice is particularly critical in the context of equal protection analyses involving private colleges and universities, where an ill-considered finding of state action "might incidentally contribute to the erosion of the autonomy and diversity of private colleges and universities." *Berrios v. Inter American Univ.*, 535 F.2d 1330, 1333 (1st Cir. 1976). Accordingly, courts have assiduously and wisely avoided a broad interpretation of state action in cases involving private institutions of higher education.

For example, courts have consistently followed *Dartmouth College's* holding that the registration, certification, or incorporation of the private entity by the State does not transform the private entity into a state actor.[6] They have also uniformly held that the "mere

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[6] See *e.g.*, *McKeesport Hosp. v. Accreditation Council*, 24 F.3d 519, 527 (3d Cir. 1994); *Yeager v. City of McGregor*, 980 F.2d 337, 342 n.9 (5th Cir.), (continued...)

offering of an education, regulated by the State," does not imbue private action with sufficient public interest to render it governmental in nature. *Krohn v. Harvard Law School*, 552 F.2d 21, 24 (1st Cir. 1977). In *Rendell-Baker*, 457 U.S. at 842, for example, legislation that guaranteed public funding to educate maladjusted high school students did not make such specialized education "the exclusive province of the State."[7]

Courts have, in addition, found that considerable regulation by the State does not compel application of the Equal Protection Clause to private educational institutions. The private school at issue in *Rendell-Baker*, for example, was subject to substantial regulation by a number of public entities, including local school committees, the State Drug Rehabilitation Division and other state agencies. *Rendell-Baker*, 457 U.S. at 833. Similarly, the university in *Inter American University*, 535 F.2d at 1332, was subject to regulations of the state accrediting council as well as other regulations applicable to institutions of higher education. The mere regulation of these entities by public bodies, however, was "not sufficient" to render the institutions state

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[6] (...continued)
cert. denied, 114 S. Ct. 79 (1993); *Cohen v. Illinois Inst. of Technology*, 524 F.2d 818, 824 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Blouin v. Loyola Univ.*, 506 F.2d 20, 21-22 (5th Cir. 1975); *Blackburn v. Fisk Univ.*, 443 F.2d 121, 123 (6th Cir. 1971); *Powe v. Miles*, 407 F.2d 73, 80 (2d Cir. 1968).

[7] *Accord Inter American Univ.*, 535 F.2d at 1333 ("[h]igher education is not generally regarded as exclusively a function 'traditionally associated with sovereignty'") (citations omitted); *Fisk Univ.*, 443 F.2d at 124 (same); *Ben-Yonatan v. Concordia College Corp.*, 863 F. Supp. 983, 987 (D. Minn. 1994) (same).

actors.[8] *Rendell-Baker*, 457 U.S. at 842; *Inter American Univ.*, 535 F.2d at 1332.

Finally, courts have routinely held that institutions that enjoy tax-exempt status[9] or receive public money in the form of loan guarantees, scholarships, or grants,[10] are not, by virtue of their receipt of these public funds, transformed into state actors.[11] Indeed, even where the public funds received by the private entity are substantial, courts have declined to

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[8] *Accord Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972); *Cohen*, 524 F.2d at 826; *Powe*, 407 F.2d at 81; *Stone v. Dartmouth College*, 682 F. Supp. 106, 108 (D.N.H. 1988); *Blum*, 457 U.S. at 1011.

[9] See, *e.g.*, *New York City Jaycees, Inc. v. United States Jaycees, Inc.*, 512 F.2d 856, 859 (2d Cir. 1975) (tax exemption "'creates only a minimal and remote involvement'" by the government in the exempt entity's activities) (citations omitted); *Browns v. Mitchell*, 409 F.2d 593, 595-96 (10th Cir. 1969) (tax exempt status does not render institution a state actor); *Fischer v. Driscoll*, 546 F. Supp. 861, 865 (E.D. Pa. 1982)(same).

[10] See, *e.g.*, *Inter American Univ.*, 535 F.2d at 1332 (university that participated in state student aid program was not found to be a state actor); *Loyola Univ.*, 506 F. 2d at 21; (fact that private university received "substantial federal and state monies in the form of grants, subsidies, student scholarships, and loans" did not support a finding of state action); *Greenya v. George Washington Univ.*, 512 F.2d 556, 561 (D.C. Cir.) ("direct grants, loans, or loan guarantees" were not sufficient to establish state action by otherwise private university), *cert. denied*, 423 U.S. 995 (1975).

[11] See also *McKeesport Hosp.*, 24 F.3d at 527 (public funds); *Yeager*, 980 F.2d at 342 n.9 (same); *Krohn*, 552 F.2d at 24 (public funds and tax exempt status); *Lorentzen v. Boston College*, 440 F. Supp. 464, 465 (D. Mass. 1977) (public funds and tax exempt status), *aff'd*, 577 F.2d 720 (1st Cir. 1978), *cert. denied*, 440 U.S. [illegible] (1979); *Cohen*, 524 F.2d at 825 (public funds); *Fisk Univ.*, 443 F.2d at 123 (public funds and tax-exempt status); *Gonyo v. Drake Univ.*, 879 F. Supp. [illegible]00, 1006 (S.D. Iowa 1995) (public funds); *Ben-Yonatan*, 863 F. Supp. at 987 (state and federal financial support); *Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535, 546-48 (S.D.N.Y. 1968) (public funds).

find state action. The private school's dismissal of teachers without due process in *Rendell-Baker*, for example, did not constitute state action in spite of the fact that the school received "virtually all of [its] income" from various state agencies. *Rendell-Baker*, 457 U.S. at 840. Similarly, the university's conduct in *Imperiale v. Hahnemann University*, 776 F.Supp. 189, 198 & n.4 (E.D. Pa. 1991), *aff'd*, 966 F.2d 125 (3d Cir. 1992), did not constitute state action even though the university received "'substantial infusions of state funds'" which were "clearly of great importance to it." (Citation omitted.) Thus, it is clear that the mere receipt of government loans or funding "is not, without a good deal more, enough to make the recipient an agency or instrumentality of the Government." *Grossner v. Trustees of Columbia Univ.*, 287 F. Supp. 535, 548 (S.D.N.Y. 1968).[12]

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[12] *Norwood v. Harrison*, 413 U.S. 455 (1973), had a different result. In *Norwood*, this Court found that the state's financial aid in the form of the provision of textbooks to private elementary and secondary schools that discriminated on the basis of race constituted state action. A canvas of the state action cases since *Norwood*, however, indicates that the Court's broad reading of the state action doctrine in that case has been limited to circumstances in which the challenged action involves invidious racial discrimination. As one court noted, "'racial discrimination is so peculiarly offensive and was so much the prime target of the Fourteenth Amendment that a lesser degree of involvement may constitute 'state action' with respect to it than would be required in other contexts.'" *George Washington Univ.*, 512 F.2d at 560 (finding that federal funding for a private university's programs and capital expenditures did not constitute state action where the challenged action was the termination of employment of an instructor without due process and in violation of his First Amendment rights) (citation and footnote omitted). While courts have found that even minimal aid to a private racially discriminatory institution triggers application of the Equal Protection Clause, see *id.*, 512 F.2d at 560 n.6 (collecting cases in which racial discrimination by a private entity constituted state action and contrasting these cases to state action determinations that went the other way in other contexts), they have, at the same time, developed and applied the state action tests discussed above in circumstances that do not involve racial

(continued...)

In sum, courts have consistently held, under one or another formulation of the state action test, that the actions of private colleges and universities are not considered those of the State simply because such institutions provide educational services, are regulated by the State, enjoy tax-exempt status, or receive state services or funding. Something more -- the assumption by the private entity of functions which are traditionally governmental in nature or State involvement that compels or supports the challenged private action -- is required. *Edmonson Oil*, 457 U.S. at 939. Consequently, the single-gender admissions policies of private colleges, which serve no governmental function and are not compelled by or related to the State, are not governed by the Equal Protection Clause. This means that if VMI could abandon its state-related public status, it could maintain its single-gender policy.

B. The Tax-Exempt Status of Private Women's Colleges Is Not Threatened by the Public Policy Requirement Enunciated in *Bob Jones University v. United States*.

Just as the Equal Protection Clause does not prohibit private colleges from maintaining single-gender admissions policies, federal tax regulations cannot force them to close their doors. *Bob Jones University v. United States*, 461 U.S. 574 (1983) does not suggest otherwise.

In *Bob Jones*, this Court affirmed the Internal Revenue Service's denial of tax-exempt status to two private colleges

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[12] (...continued)
discrimination. Those tests, as demonstrated herein, establish that the receipt of even substantial and essential public funding does not render an otherwise private action that of the State.

that maintained racially discriminatory enrollment policies. The Court's analysis there began with the determination that Congress, in enacting the Internal Revenue Code, intended that tax-exempt institutions must, in addition to fitting into one of the categories enumerated in the relevant Code provisions, "serve a public purpose and not be contrary to established public policy." *Id.* at 586. This Court then found that racial discrimination in education violates "a most fundamental national public policy." *Id.* at 593. Private colleges that practice racial discrimination cannot, it followed, enjoy tax-exempt status.

While there is no doubt that the racially discriminatory policies espoused by the two institutions in *Bob Jones* "violate[d] deeply and widely accepted views of elementary justice," *id.* at 592, this Court's threshold determination that tax-exempt institutions must "demonstrably serve and be in harmony with the public interest," *id.*, met with some skepticism, even among the members of the Court.[13] Critics charged that the Court had given little guidance regarding the scope and application of the public policy requirement and warned that the *Bob Jones* opinion might herald a new era in which private institutions would be required to conform with mainstream ideology in order to retain their tax-exempt status.[14]

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[13] See *Bob Jones*, 461 U.S. at 608 (Powell, J., concurring) ("I am unconvinced that the critical question in determining tax-exempt status is whether an individual organization provides a clear 'public benefit.'"); *id.* at 618 (Rehnquist, J., dissenting)("I reject the Court's heavyhanded creation of the requirement that an organization seeking [tax-exempt] status must "'serve and be in harmony with the public interest.'") (citation omitted).

[14] See, *e.g.*, Note, *The Independent Sector and the Tax Laws: Defining Charity in an Ideal Democracy*, 64 S. Cal. L. Rev. 461, 476, 477, 478 (1991)(noting the "uncertainty of the [*Bob Jones*] decision" in which "the

(continued...)

Yet *Bob Jones* has had no such impact. Neither the IRS nor the lower courts have read the decision as an invitation to apply the public policy requirement to deny tax exemptions in circumstances beyond those that closely parallel the circumstances encountered in *Bob Jones*.[15]

That the *Bob Jones* public policy requirement has fostered limited change in the status of tax-exempt

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[14] (...continued)
reach of [the public policy] test was not clarified," and speculating that *Bob Jones* may "result in the compromise of the pluralistic character of our charitable organization structure" and lead to "arbitrary and narrow determinations that in turn will defeat freedom of choice"); Steven R. Swanson, *Discriminatory Charitable Trusts: Time for a Legislative Solution*, 48 U. Pitt. L. Rev. 153, 165 (1986)(noting that the "*Bob Jones University* test . . . probably will not provide a satisfactory solution to the problem" of deciding whether an activity violates public policy); Francis R. Hill and Barbara L. Kirschten, *Federal and State Taxation of Exempt Organizations* § 2.03[6] (1994) (noting "the absence of specific guidance" in the area of public policy requirements for tax-exempt organizations and warning tax advisors to proceed with "extreme caution"); *Bob Jones*, 461 U.S. at 612, 609 (Powell, J., concurring) (observing that the *Bob Jones* holding left unanswered "[m]any questions" such as "whether organizations that violate other policies should receive tax-exempt status" and that the public policy requirement "ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints").

[15] The IRS and courts have tended to limit their application of the *Bob Jones* public policy requirement to the context of racial discrimination. See, *e.g.*, IRS Priv. Ltr. Rul. 8910001 (Nov. 30, 1988) (denying exempt status to trust limiting its beneficiaries to "worthy and deserving white persons" over the age of 60); *Virginia Educ. Fund v. Commissioner*, 85 T.C. 743 (1985) (revoking tax-exempt status of a fund for racist private schools), *aff'd*, 799 F.2d 903 (4th Cir. 1986); *Prince Edward School Found. v. Commissioner*, 478 F. Supp. 107 (D.D.C. 1979) (revoking tax exempt status of nonprofit private elementary school and high school due to racist policies), *aff'd mem.* (D.C. Cir. 1980), *cert. denied*, 450 U.S. 944 (1981).

organizations is not surprising in light of the constraints on the requirement set forth in the opinion. This Court warned that the determination of public policy is a "sensitive matter[] with serious implications for the institutions affected" and repeatedly cautioned that a declaration that a private institution contravenes public policy should be made "only where there is no doubt that the organization's activities violate fundamental public policy." *Bob Jones*, 461 U.S. at 592, 598. It acknowledged that its lack of doubt that racial discrimination violated public policy was singular, noting that "[f]ew social or political issues in our history have been more vigorously debated and more extensively ventilated." *Id.* at 595. Finally, it clearly set forth the basis for its determination that racial discrimination by educational institutions violates public policy: an "unmistakably clear" concordance between "all three branches of the Federal Government" (*id.* at 598) that racial discrimination must be eradicated, manifested by an "unbroken line of [this Court's] cases" and "myriad Acts of Congress and Executive Orders" spanning over a quarter-century. *Id.* at 593.

The single-gender admissions policies of private colleges thus are not jeopardized by the *Bob Jones* public policy requirement. The three branches of the federal government have not, acting independently or in concert, articulated a position against, much less launched a crusade to dismantle, private single-sex colleges. No court has questioned the constitutionality of private undergraduate single-gender colleges or drawn any adverse conclusions about the pedagogical or social worth of single-gender educational opportunities. No statement or order by the executive branch has condemned the policies offered by such institutions to justify their place in the educational marketplace. And Congress has passed no law that undermines the viability or questions the value of single-sex private higher education.

Indeed, the clearest evidence that the federal government considers private single-gender colleges worthy of preserving is Title IX of the Education Amendments of 1972. 20 U.S.C. §§ 1681 *et seq.* Title IX, which prohibits sex discrimination "under any education program or activity receiving Federal financial assistance," specifically exempted from its purview private institutions of undergraduate higher education. 20 U.S.C. § 1681(a)(1).[16] Thus, while Congress assured that both males and females would have equal educational opportunities at public and private professional, graduate, and vocational schools and public undergraduate schools, it specifically recognized that private institutions offering single-gender undergraduate educational opportunities should be preserved.

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[16] Section 1681(a)(1) provides:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that . . . in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education."

Thus, § 1681(a)(1) of Title IX excludes the admissions policies of single-gender private colleges altogether. By contrast, § 1681(a)(5) governs single-gender public institutions and grandfathers "any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex."

Accordingly, while the creation of a new single-gender public college is prohibited by § 1681(a)(5) of Title IX, since such a new institution could not be "grandfathered," a new private single-gender college may be established today without violating the statute.

In short, there is no "fundamental public policy" or "declared position of the whole Government" which the maintenance or establishment of private single-gender undergraduate college programs contravenes. *Bob Jones*, 461 U.S. at 594, 599. Moreover, whatever the pedagogical evidence, if any, supporting single-gender education for males, the evidence is clear and well-established that single-sex education for women is particularly effective in preparing them for leadership and success, generally, and in male-dominated fields, more particularly. See Statement of Interest, *supra*. A private VMI, then, like private women's colleges, would enjoy tax-exempt status as long as it could show - as women's colleges can - a valid pedagogical purpose consistent with public policy.

CONCLUSION

For the reasons set forth above, *VMI II* should be reversed. It should be reversed because VMI is a public institution that does not pass constitutional muster under the standard articulated in *Mississippi University for Women*, and as a public, state-supported college it must meet that standard. In reversing *VMI II*, however, the Court should make clear that the demise of VMI's male-only admissions policy does not undermine the strength and viability of private women's colleges.

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. THE VWIL PROGRAM AT MARY BALDWIN COLLEGE PROVIDES SUBSTANTIAL BENEFITS THAT WOULD NOT BE AVAILABLE UNDER THE GOVERNMENT'S PROPOSED REMEDY OF A COEDUCATIONAL VMI. 3

A. Mary Baldwin College Designed the VWIL Program to Suit the Needs and Abilities of Real Students, Not Stereotypes. 3

B. The VWIL Program is a Rigorous, Multi-Disciplinary Educational Experience That Is Designed to Achieve Outcomes Comparable to Those Produced by VMI. 5

C. There Are Legitimate Reasons for Differences Between the VWIL and VMI programs. 7

II. RECENT STUDIES DEMONSTRATE THAT SINGLE-SEX EDUCATION PROVIDES SUBSTANTIAL BENEFITS TO WOMEN. 8

A. Single-Sex Education Contributes to Higher Academic Achievement and Self-Esteem in Women. 9

B. Single-Sex Education Has Been Linked with Greater Career Achievement. 15

C. Single-Sex Education Encourages Women to Pursue Male-Dominated Careers. 17

III. REVERSAL OF THE DECISION BELOW WILL THREATEN THE CONTINUED EXISTENCE OF MARY BALDWIN AND OTHER PRIVATE WOMEN'S COLLEGES. 20

A. Single-Gender Education Programs for Women Will Be Difficult to Justify on a Remedial Rationale. 20

B. Private Institutions Will Face a Loss of Government Financial Support..... 22

C. Private Institutions Will Face a Loss of Charitable Tax Exemption and Tax Deductible Contributions. 25

D. The Application of "Strict Scrutiny" Will Exacerbate the Threat to Private Women's Colleges. 28

CONCLUSION 29

TABLE OF AUTHORITIES

	PAGE
Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995)	21
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PAGE

STATUTES

20 U.S.C. § 1681(a)(1) & (5) (1988) 27
26 U.S.C. § 170 (1988) 25
26 U.S.C. § 501(c)(3) (1988) 25

TREASURY DETERMINATIONS

Rev. Rul. 71-447, 1971-2 C.B. 230 25
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PAGE

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PAGE

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BRIEF OF MARY BALDWIN COLLEGE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE*

Mary Baldwin College ("MBC") is a private four-year, liberal-arts college for women located in Staunton, Virginia. Founded in 1842, MBC has a long history of providing higher education in a single-sex setting and a track record of developing innovative degree programs. Total enrollment is over 2000. Approximately 800 women attend the four-year residential undergraduate program at the MBC campus, which successfully prepares its graduates for pursuit of careers as leaders in business and the professions.

MBC agreed to create the Virginia Women's Institute for Leadership ("VWIL") to serve as a remedy in this litigation, for three reasons. First, MBC believes that single-sex education conveys unique educational benefits and should be available to both women and men. Second, MBC is convinced that a wide array of educational options is crucial to the future strength of this Nation and should be publicly available. Third, VWIL presents an extraordinary opportunity; it is a forward-looking program which serves a real need for the young women of today.

SUMMARY OF ARGUMENT

VMI and MBC are unique institutions with their own distinctive campuses, histories, and cultures. Each has course offerings, facilities and traditions that are not found at the other. Such differences are inevitable whenever two colleges are compared. The courts below held that a parallel program for women need not be identical to VMI, and that differences can be justified by a variety of relevant factors.

The government and its *amici* have argued, to the contrary, that any significant difference between VMI and VWIL is constitutionally intolerable, and that the only acceptable remedy is to require VMI to admit women. This is tantamount to a position that coeducation is constitutionally mandated. It would be virtually impossible for a state to maintain separate educational institutions for men and women that are identical in all respects. It would also be unwise to require such institutions to mirror each other when the needs and interests of the students at each institution may differ.

The design of the VWIL program reflects the best professional judgment of the faculty and administration of MBC. VWIL's content and methodology are based on contemporary research on leadership and the benefits of single-sex education. The program is founded on the belief that women can and do provide significant leadership in the military and other traditionally male-dominated fields, that career opportunity is not restricted by gender, and that single-sex education is for many women better than coeducation in achieving these goals.

Although the outcomes of the two programs are in all significant respects the same, the VWIL program differs somewhat from VMI in how these outcomes are achieved. These differences are the result of a careful planning process and are not the consequence of inattention or stereotypical views about the roles or abilities of women. The courts below properly found that the VWIL program is soundly designed and fully capable of meeting its objectives.

In addition to its interest in maintaining the VWIL program, MBC supports the option of single-gender education for males and females. The courts below in this case have found that single-sex education is pedagogically justified for both men and women. MBC also believes that, for legal and practical reasons, single-sex education for women will be threatened if single-sex education for men is outlawed.

ARGUMENT

I. THE VWIL PROGRAM AT MARY BALDWIN COLLEGE PROVIDES SUBSTANTIAL BENEFITS THAT WOULD NOT BE AVAILABLE UNDER THE GOVERNMENT'S PROPOSED REMEDY OF A COEDUCATIONAL VMI.

A. Mary Baldwin College Designed the VWIL Program to Suit the Needs and Abilities of Real Students, Not Stereotypes.

The Equal Protection Clause does not dictate that MBC conduct a program identical to that of VMI. However, the Court's analysis of this constitutional issue should be based upon an accurate characterization of the VWIL program, not the exaggerated presentation found in briefs submitted by certain of the government's *amici*. Those briefs would lead the Court to believe that the VWIL program is a "watered-down VMI" founded on archaic stereotypes about women rather than on careful analysis. Such caricatures of VWIL are contradicted by the facts in the record.

The VWIL program was designed by a task force of educators, not by lawyers. The charge of the Task Force was to design the best possible baccalaureate program for women that would produce ambitious and capable graduates, providing the nation with leadership in the public and private arenas.

The Task Force was created by MBC's President, Cynthia H. Tyson, and co-chaired by Dean James D. Lott and Dean Heather Anne Wilson. Dr. Tyson, Dr. Lott and Dr. Wilson collectively have more than 70 years' experience in single-gender education for women. The Task Force included faculty members, administrators and students; it also called upon *ad hoc* members with expertise in the areas of physical education and training, computer science, ROTC, and developmental psychology.

VWIL began operation in August 1995 and is already

achieving its goals. There are far more similarities between the VWIL and VMI programs than there are differences. Both are intellectually and physically rigorous, highly structured single-sex baccalaureate programs. Both develop students' leadership skills, foster self-discipline and personal integrity, and cultivate team-building skills. An important factor in both is the building of a sense of community and of personal responsibility to that community. And both provide many opportunities for the practice of leadership in a variety of settings.

To be sure, the VWIL program differs in a number of ways from the VMI program. Some of these differences are the result of predictions by MBC and its Task Force about the needs and interests of the students who would attend the VWIL program. These predictions were not based on outmoded stereotypes but instead reflect actual experience in women's education and a recognition that there are often real differences in the physical and developmental characteristics of college-age men and women.

Educational programs such as VWIL must be designed to attract and meet the needs of students with a range of abilities and interests.[1] The demand for residential military college programs among women is quite small. MBC determined that there would be little, if any, demand for a women's program that adopted all of the elements of the VMI system. There has never been, and no educational expert (including the government's experts in this case) has ever recommended, the establishment of a military college

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[1]For this reason, designing an educational program is not analogous to the situation presented in *J.E.B. v. Alabama, ex rel. T.B.*, 114 S. Ct. 1419 (1994). A peremptory strike necessarily applies to a particular individual. A college program cannot be designed to fit the particularized needs of each student.

program for women including the rat line and other elements of the extreme adversative method at VMI.

It would have been possible to design the VWIL program to more closely resemble VMI, with adversative techniques associated with the rat line and barracks-like living quarters. Simply replicating an existing program would have required far less thought, research, and educational expertise. But such a facile approach would have produced a paper program with no real prospect of successful implementation. MBC believes it would be professionally irresponsible to compromise student welfare by designing a program to meet litigation objectives instead of student needs.

B. The VWIL Program is a Rigorous, Multi-Disciplinary Educational Experience That Is Designed to Achieve Outcomes Comparable to Those Produced by VMI.

Both VWIL and VMI offer students the substantial benefits of a single-sex educational environment. Just as important to the outcome is the augmentation of these benefits with a holistic, 24-hour-a-day leadership development environment. Both programs are highly structured and mentally and physically rigorous. In both programs, academic requirements, co-curricular activities, student government, and residence life are interrelated and geared toward the building of personal integrity and leadership skills. The five central goals of the two programs are identical: rigorous baccalaureate-level education, military training, mental and physical discipline, character development, and leadership development. Both programs have the mission of producing "citizen" soldiers.

The outcome for students in both programs is preparation for successful careers and leadership in whatever field they choose; no distinction is made by either VWIL or VMI in terms of what careers or avocations are "appropriate" for either sex. In fact, the VWIL requirements in military

training, math, science, and computer science explicitly encourage women to explore and excel in traditionally male-dominated fields.

In VWIL, students must complete four interdisciplinary courses which provide students with an awareness of what leadership requires. Moreover, as at VMI, within VWIL there are many opportunities to practice leadership, in addition to the over 150 leadership positions available in the residential MBC undergraduate program as a whole.

The VWIL and VMI physical and health education programs require the same amount of training. In each program, students must take physical fitness tests, complete eight semesters of physical education courses, and undergo additional physical training. The physical fitness standards for the women in VWIL are just as strenuous as those for men at VMI. VWIL's "leadership challenge" program, mandatory for all freshmen who are not participating in varsity athletics, is directly analogous to and uses many of the same facilities as VMI's rat challenge, which is mandatory for all first-year students except those who are participating in varsity athletics.

Both programs require four years of ROTC training, and in fact the ROTC requirements of VMI cadets and VWIL cadets are identical. The same options are available to students in the two programs--Navy, Marine Corps, Army, and Air Force--and all VMI and VWIL students may elect to seek a commission. In fact, ROTC scholarships are held by students in both programs. Seeking a commission is, however, not mandatory in either program. Each student spends two hours in class and lab each week; the facilities, faculty, and options for VWIL and VMI cadets are exactly the same. In addition to ROTC activities, VMI cadets drill within their cadet corps, and VWIL students spend about 25 hours a semester in drill and ceremonies training on the MBC campus.

Both programs develop strong bonding and sense of

community among the students. In VWIL, this process started during the VWIL orientation week, prior to regular MBC freshman orientation. This VWIL orientation included a variety of mentally and physically challenging activities. At both VMI and VWIL, mandatory co-curricular activities contribute to the development of community.

In short, the goals of VWIL and VMI are the same, and the methodologies employed to attain those goals have many of the same elements.

C. There Are Legitimate Reasons for Differences Between the VWIL and VMI programs.

The VWIL program differs somewhat from VMI but is not inferior.[2] Some of these differences are attributable to the fact that the VWIL program operates in conjunction with the traditional undergraduate program at MBC. The Task Force decided that VWIL students should not reside in a separate dormitory for four years, wear uniforms at all times, or eat their meals apart from the other MBC students. These decisions were based not on stereotypical assumptions but on their professional judgment that the VWIL students would have a more satisfactory college experience, with more opportunities for leadership, if they

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[2]The government does not argue that the financial support provided by the Commonwealth to VWIL is inadequate or unequal to that provided to VMI. The remedial plan requires the Commonwealth to provide financial support for students attending the VWIL program that is equal to that provided for VMI students. In addition, the VMI Foundation will provide the VWIL program with a permanent endowment of $5.4625 million and make other financial contributions to bring the total to nearly $7 million, an amount which one expert witness described as "lavish" for a program of this kind. Remedy Tr. 1543-44.

were integrated into the larger MBC community.

There are also some differences due to institutional autonomy. For example, MBC believes that its honor code is as effective in defining responsibility to the community and inculcating integrity as VMI's honor code. It would be the height of irony for the government, in the name of women's rights, to seek to compel MBC to abandon its traditions and mimic the practices of VMI when there is no good reason to do so.

Finally, there are differences resulting from the fact that VWIL is a new program and VMI has been in existence for many years. There are benefits to participation in a new program, which can include a sense of excitement and challenge that may not be available to those who simply follow the traditions of the past. The VWIL program has been designed in light of the most current research on leadership development and educational methodology. VWIL students also share in the traditions of MBC and will have the benefits of the alumni networks of both MBC and VMI.

In summary, while the VWIL program is admittedly different in some respects from the VMI program, these differences have legitimate justifications and generally enhance the value of the program to its participants. MBC believes, and the courts below agreed, that the VWIL program offers women benefits that are at least as valuable as those offered to men by VMI.

II. RECENT STUDIES DEMONSTRATE THAT SINGLE-SEX EDUCATION PROVIDES SUBSTANTIAL BENEFITS TO WOMEN.

An impressive body of recent studies demonstrates that single-sex schools lead to higher achievement and self-esteem in women, encourage women to pursue traditionally male-dominated careers, and alleviate some of the disadvantages a number of women may suffer in a coedu-

cational setting.

A. Single-Sex Education Contributes to Higher Academic Achievement and Self-Esteem in Women.

Recent studies strongly suggest that, at both the secondary and college levels, women in single-sex schools not only outperform their peers in mixed-sex schools, but show higher levels of self-esteem and a greater sense of personal control.

In one of the most frequently cited of these studies, Professors Valerie Lee and Anthony Bryk compared the effects of single-sex and mixed-sex Catholic secondary schools on a number of specific variables, including areas of academic achievement, achievement gains, educational aspirations, self-image, sense of personal control over environment, and attitudes and behaviors related to academics.[3] *See* Valerie E. Lee & Anthony S. Bryk, *Effects of Single-Sex Secondary Schools on Student Achievement and Attitudes*, 78 J. EDUC. PSYCHOL. 381 (1986) (hereinafter "Lee & Bryk (1986)"). Analyzing data from a longitudinal study of randomly-selected high school sophomores and seniors entitled "High School and Beyond," Professors Lee and Bryk "found that single-sex schools appear to deliver specific advantages to their students." *Id.* at 394. Relative to their peers in the coeducational schools, girls from the single-sex schools were more likely to "express specific interests in both mathematics and English," *id.* at 387, demonstrated

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[3]Because of the scarcity of single-sex public schools in this country, several of the studies comparing single-sex and mixed-sex secondary schools have used data from private Catholic schools. For a discussion of the formal and informal structure of these Catholic schools, *see* Cornelius Riordan (hereinafter "Riordan (1990)") GIRLS AND BOYS IN SCHOOL: TOGETHER OR SEPARATE? 62-81 (1990).

"significantly greater gains in reading, science, and educational ambition over the course of their high school years," *id.* at 394, and had higher ratings for self-image and sense of personal control, *id.* at 386.

Professors Lee and Bryk attributed these positive results to the absence of distractions and pressures caused by members of the opposite sex:

> [S]ingle-sex secondary schooling may in fact serve to sensitize young women to their occupational and societal potentials in an atmosphere free of some of the social pressures that female adolescents experience in the presence of the opposite sex. Adolescence is a critical period for the formation of attitudes about oneself. It may be that some separation of students' academic and social environments removes the distractions that can interfere with the academic development of some students.

Id. at 394. A follow-up study based on additional data obtained after graduation demonstrated that the beneficial effects of single-sex high school experience persisted into the college years. *See* Valerie E. Lee & Helen M. Marks, *Sustained Effects of the Single-Sex Secondary School Experience on Attitudes, Behaviors, and Values in College*, 82 J. EDUC. PSYCHOL. 578 (1990) (hereinafter "Lee & Marks").[4]

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[4]Although most of the studies analyzing the "High School and Beyond" data have found significant advantages for single-sex schools, one study found no significant effects. *See* Marsh, *Effects of Attending Single-Sex and Co-educational High Schools On Achievement, Attitudes, Behaviors and Sex Differences*, 81 J. EDUC. PSYCHOL. 70 (1989). Professors Lee and Bryk have criticized this study on methodological grounds. *See* Lee & Bryk, *Effects of Single-Sex Schools: Response to Marsh*, 81 J. EDUC. PSYCHOL. 647 (1989).

The work of Cornelius Riordan, an Associate Professor of Sociology at Providence College, supports these findings. Professor Riordan conducted three recent studies on single-sex education which culminated in a book, Riordan 1990, *supra*. In the first of these studies, Professor Riordan analyzed data from the "High School and Beyond" survey to examine the influence of single- and mixed-sex Catholic school education on advanced mathematics, writing, science, civics, self-esteem, and sense of personal control. *Id.* at 82-113. The results significantly favored the single-sex schools. On average, girls in the single-sex schools "score[d] about one-third of a grade equivalent higher than girls in mixed-sex schools," scoring "almost one full year" higher in science. *Id.* at 112. Girls in the single-sex category also scored higher on measures of self-esteem and personal control than did the girls in the mixed-sex category. *Id.* at 109-10.[5]

In the second of his three studies, Professor Riordan investigated the long-term outcomes of single-sex education. Riordan (1990), *supra*, at 114-15, 129-34. This study analyzed questionnaire and performance test data from the National Longitudinal Study of the High School Class of 1972, a survey that recorded performance test and questionnaire data from high school seniors in the year 1972,

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[5]The results of Professor Riordan's 1990 study are consistent with an earlier study in which he compared the effects of single-sex Catholic, mixed-sex Catholic, and mixed-sex public schools. *See* Cornelius Riordan, *Public and Catholic Schooling: The Effects of Gender Context Policy*, 93 AM. J. EDUC. 518 (1985). Although Riordan found virtually no difference between the mixed-sex Catholic and mixed-sex public schools, the performance of students from the Catholic single-sex schools was significantly greater than the performance of students from the mixed-sex schools. *Id.* at 536.

and collected additional data from those same students for the years 1973, 1974, 1976, 1979 and 1986. Professor Riordan concluded that the beneficial effects of single-sex education on cognitive ability persist as many as seven years after graduation from high school. *Id.* at 134. In addition, the girls from the single-sex high schools "achieved higher education than their female counterparts from mixed-sex high schools." *Id.*

Professor Riordan's work also demonstrates that the benefits of single-sex education are not limited to the secondary school level. In the third of his three recent studies, he used the National Longitudinal Study of the High School Class of 1972 to compare data from women who had attended single-sex colleges. *Id.* at 116-28, 133-34. The study found that "women's colleges have a very strong influence on both educational and occupational achievement." *Id.* at 133.

In analyzing the results of his extensive research, Professor Riordan has concluded that

> [S]ingle-sex schools offer an environment that is more conducive to learning than mixed-sex schools, especially for women. They provide more role models for students, and they offer more order and control than mixed-sex schools. In all-girl schools, the adolescent climate is weak, allowing an academic climate to flourish.

Id. at 151.

Professor Riordan's results are consistent with a study by Daryl G. Smith, a Professor of Education and Psychology at the Claremont Graduate School. *See* Smith, *Women's Colleges and Coed Colleges: Is There A Difference For Women?*, 61 J. HIGHER EDUC. 181 (1990). Analyzing data from students enrolled in single-sex and coeducational colleges in 1982 and questioned four years later, Professor Smith found that "women's colleges relate positively to a variety of measures of student satisfaction, perceived

changes in skills and abilities, and educational aspirations and educational attainment." *Id.* at 191. Significantly, students from the women's colleges were more likely to obtain a degree from their institutions than their counterparts at the coeducational colleges. *Id.* at 191-92. Students from the women's colleges also gave high ratings to measures "having to do with the academic program of the institution and the contact with faculty and administration, as well as on perceived changes in values of tolerance and cultural awareness." *Id.* at 191. The only area where students from coeducational schools rated their experience more positively than did students from the women's colleges was in the area of social life.[6] *Id.* at 192.

Most recently, a study by doctoral candidate Mikyong Kim and Professor of Sociology Rodolfo Alvarez of the University of California at Los Angeles analyzed longitudinal data from women enrolled in single-sex and coeducational four-year colleges during the period 1987-91. Kim

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[6]Professor Smith analogized his findings to those of Professor Alexander Astin in FOUR CRITICAL YEARS: EFFECTS OF COLLEGE ON BELIEFS, ATTITUDES, AND KNOWLEDGE (1977). In a more recent study, Professor Astin has suggested that "institutional type, as such, has little direct effect on student development." *See* A. Astin, WHAT MATTERS IN COLLEGE? FOUR CRITICAL YEARS REVISITED 323 (1993). Nevertheless, Astin still found that attending a women's college was positively associated with numerous factors including baccalaureate completion, satisfaction with faculty and overall quality of instruction, leadership measures, writing skills, analytical and problem-solving skills and critical thinking ability. *Id.* at 324. Most of these positive effects were "directly attributable to attending a women's college" and could not "be entirely explained or accounted for on the basis of other characteristics, such as small size, residential emphasis, and private control." *Id.* at 325.

& Alvarez, *Women-Only Colleges: Some Unanticipated Consequences*, 66 J. HIGHER EDUC. 641 (1995). This study found that women's colleges were more effective than coeducational colleges in improving their students' academic ability and social self-confidence. *Id.* at 651, 653. The authors suggest that "a partial reason for the positive impact of women-only colleges is that their women students are surrounded by peers having high intellectual self-esteem." *Id.* at 651. The authors observe that "women-only colleges appear to provide students better opportunities to be actively involved in student organizations, to exercise leadership, and thus to improve their social self-confidence." *Id.* at 661.[7]

The authors conclude as follows:

> Finally, public policy makers would be well advised to continue support for women-only colleges. Social and financial support for women-only colleges should

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[7]The one area where the authors found no advantage or disadvantage to women's colleges was in preparation for entry into graduate or professional schools. The study also found that women seniors at coeducational colleges were more likely to have acquired job-related skills. Kim & Alvarez, *supra*, at 661. The authors suggest that these findings may be attributable in part to the fact that women's college faculty are disproportionately concentrated in the humanities and social sciences. *Id.* at 658. The authors also suggest that, despite these results, "women-only colleges' strength in developing social self-confidence as well as academic ability may provide a long-term foundation for higher proportions of career achievers among their graduates, compared to their coeducational counterparts." *Id.* at 661. Moreover, regardless of what may be the case at other women's colleges, MBC's undergraduate program has a strong emphasis on career development, and the VWIL program requires substantial course work in math and science.

> be based on demonstrated long-term organizational effectiveness among dimensions that are educationally important for women students, rather than on transitory views not supported by research.

Id. at 662.

B. Single-Sex Education Has Been Linked with Greater Career Achievement.

In addition to those studies that measure achievement through questionnaire data, performance tests, and school records, there are studies suggesting that women graduates of single-sex colleges are more likely than their peers at coeducational institutions to have been recognized for their career achievement.

In the first of these studies, Professor Elizabeth Tidball of George Washington University Medical Center analyzed a sample of randomly-selected women cited in "Who's Who of American Women." *See* Tidball, *Perspective on Academic Women and Affirmative Action*, 54 EDUC. REC. 130 (1973) (hereinafter "Tidball (1973)"). She concluded that, relative to the total number of their women graduates, the women's colleges produced a higher proportion of "achievers" than did the coeducational colleges. *Id.* at 132.

Some later studies have criticized the Tidball study on the ground that a disproportionate number of the "achievers" who had graduated during the years under study (1910 through 1940) were from the highly selective Seven Sisters Colleges (Barnard, Bryn Mawr, Radcliffe, Mount Holyoke, Smith, Vassar, and Wellesley). Notwithstanding these criticisms, more recent studies have suggested that women's colleges do play an important role in producing successful graduates. In one such study, Professor Tidball reanalyzed her own data and found that, relative to the total number of women graduates, "highly selective women's colleges were twice as likely to have produced achievers as were the highly selective coeducational colleges." *See* Tidball,

Women's Colleges and Women Achievers Revisited, 5 SIGNS: J. WOMEN CULTURE & SOC'Y 504, 512 (1980). "Similarly, all other women's colleges were twice as likely to have produced achievers as were all other coeducational colleges." *Id.* at 512.

A more recent study partially replicated Professor Tidball's results using data from women achievers who had graduated in more recent decades. Rice & Hemmings, *Women's Colleges and Women Achievers: An Up-date*, 13 SIGNS: J. WOMEN CULTURE & SOC'Y 546 (1988) (hereinafter "Rice & Hemmings"). Although the results were not statistically significant, the study found that in proportion to the total number of women graduates women's colleges had one and one-half as many graduates who were achievers as did the coeducational colleges during the decade of the 1970's. *Id.* at 556.

The success of women's colleges in producing a high rate of women achievers has been the subject of much discussion. Professor Tidball attributed her results to the prevalence of female faculty role models and mentors at women's colleges. She found that, for both single-sex and coeducational colleges, the number of "career-successful women graduates" increased as the ratio of women faculty members to women students increased. Tidball (1973), *supra*, at 135. Other researchers have similarly concluded that "[t]here seems little question that an environment in which many women teachers and mentors provide traditional and nontraditional examples of achievement is an advantage to young women." Rice & Hemmings, *supra*, at 558.[8]

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[8]The Kim and Alvarez study, on the other hand, questions Tidball's hypothesis that the success of women's colleges is attributable to their higher proportion of female faculty members. They found that "percent of female faculty as a variable was *not* a significant positive predictor for any

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While it may be difficult to isolate the specific reasons why women's colleges have been successful in producing a high rate of women achievers, these studies indicate that women's colleges offer significant advantages over coeducational institutions.

C. Single-Sex Education Encourages Women to Pursue Male-Dominated Careers.

A diverse body of literature suggests that women attending single-sex schools may be more likely than their peers at coeducational schools to pursue male-dominated careers.

Following her pioneering study on women achievers in 1973, Professor Tidball performed three additional studies to examine the baccalaureate origins of scientists and scholars, men and women entering medical school, and men and women with natural science doctorates. *See* Tidball & Kistiakowsky, *Baccalaureate Origins of American Scientists and Scholars*, 198 SCI. 645 (1976); Tidball, *Baccalaureate Origins of Entrants into American Medical Schools*, 56 J. HIGHER EDUC. 385 (1985); Tidball, *Baccalaureate Origins of Recent Natural Science Doctorates*, 57 J. HIGHER EDUC. 606 (1986). In each of these studies, Professor Tidball found that, relative to the total number of women graduates, the women's colleges produced a significantly higher proportion of graduates in these fields of study than did coeducational colleges.

In another study, Professor of Sociology Marvin Bressler

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dimension of women students' development in any of our analyses." Kim & Alvarez, *supra*, at 661. Although these scholars found a supportive institutional environment to be generally quite important, they attribute much of the unique success of women's colleges to the nature of peer interactions among students. *Id.* at 661-62.

of Princeton University and his colleague Peter Wendell explored the impact of single-sex and mixed-sex colleges on career aspirations. *See* Bressler & Wendell, *The Sex Composition of Selective Colleges and Gender Differences in Career Aspirations*, 51 J. HIGHER EDUC. 660 (1980). Analyzing responses to a national survey of male and female undergraduates enrolled in single-sex and coeducational colleges, the study concluded that between freshman and senior year, there was a significant increase in the number of women from single-sex colleges who intended to pursue more "masculine" vocations. *Id.* at 660.[9] In contrast, the coeducational colleges had "no appreciable demonstrable influence on the career ambitions of either sex." *Id.* at 662. Based on these results, the researchers suggested that "sexual parity in the occupational domain might be better served if larger numbers of young women were to enroll in single-sex colleges." *Id.*

A more recent study analyzing questionnaire data from college women has suggested that single-sex education along with family structure plays an important role in influencing career choice. *See* Rubenfield & Gilroy, *Relationship Between College Women's Occupational Interest and a Single-Sex Environment*, 40 CAREER DEV. Q. 64 (1991). The study found that, although there are numerous factors that might affect a woman's career choice, "the opportunity to interact in a single-sex environment is important at some stage of a young women's life, if she is to develop nontraditional interests." *Id.* at 70.

These studies on career choice are consistent with other studies demonstrating that women who attend single-sex

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[9]Among the "masculine" professions included in the study were college professor, lawyer, physician, accountant, business executive, business owner, engineer, scientific researcher, and religious professional.

colleges or high schools have less stereotypical views about gender roles than do women attending coeducational schools. Professor Lee and her colleagues have shown that women who attend single-sex high schools or single-sex colleges have less stereotypical views about the compatibility of work and motherhood, and the traditional role of men. Lee & Bryk (1986), *supra*, at 389; Lee & Marks, *supra*, at 584-85. Similarly, Professor Riordan demonstrated that women graduates of single-sex colleges and high schools hold "more liberal attitudes toward working women" and "much stronger views toward equal sex roles" than their peers at single-sex schools. *See* Riordan (1990), *supra* at 110, 133-34.

Yet another body of research has indicated that single-sex education may have a positive effect on women's participation and interest in the traditionally male-dominated fields of mathematics and science.[10] One study, for example, concluded that single-sex high school physics classes had a "statistically significant, positive influence upon girls' interest in physics-related careers, while mixed-sex classes may have had a slight negative influence." Stowe, *Should Physics Classes Be Single Sex?*, Physics Teacher, Sept., 1991, at 380.

A similar study of single-sex classes in post-primary

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[10]A substantial number of studies have shown that girls generally participate less, receive less teacher attention, and show less interest and confidence than do boys in the subjects of mathematics and science. *See, e.g.*, American Association of University Women, *How Schools Shortchange Girls 24-30* (1992); American Association of University Women, *Shortchanging Girls, Shortchanging America 12-14* (1991); Becker, *Differential Treatment of Females and Males in Mathematics Classes*, 12 J. RES. MATHEMATICS EDUC. 40 (1981).

schools in Australia concluded that "students in single-sex classes indicated significantly higher gains in confidence over time than those in mixed-sex classes" and that this confidence "significantly increased the likelihood" of "subsequent participation" in mathematics. Rowe, *Single-Sex and Mixed-Sex Classes: The Effects of Class Type on Student Achievement, Confidence and Participation in Mathematics*, 32 AUSTRALIAN J. EDUC. 180, 195-96 (1988). These findings may be of critical importance given a recent study indicating that adolescents who like math and science "express stronger desires for careers as teachers, doctors and scientists" and "are more likely to aspire to careers as professionals." *American Association of University of Women, Shortchanging Girls, Shortchanging America 15* (1991).

III. REVERSAL OF THE DECISION BELOW WILL THREATEN THE CONTINUED EXISTENCE OF MARY BALDWIN AND OTHER PRIVATE WOMEN'S COLLEGES.

The government and some of its *amici* seek to reassure the Court and their constituencies that a decision against VMI in this case would have no implications for the continued existence of single-sex education for women, particularly at private institutions. In truth, a decision favoring the government in this case could produce substantial obstacles to any public or private educational program that admits only women.

A. Single-Gender Education Programs for Women Will Be Difficult to Justify on a Remedial Rationale.

The government and some of its *amici* have suggested that single-gender education for women can be sustained even if single-gender education for men were held to be unconstitutional, based on a theory of compensating for past discrimination. The legal predicate for this theory is weak.

This Court explicitly rejected such a compensatory rationale in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 727-28 (1982). The Court has made it clear that "benign" discrimination will not be automatically upheld on such a compensatory rationale and that a close fit must be established between past conduct violating the Constitution and a remedy limited to counteracting the effects of such conduct. It would be difficult for women's colleges to justify their admissions policies under this sort of scrutiny.[11]

Also problematic is the factual case for women's colleges as a remedy for past discrimination. Although discrimination against women undoubtedly persists in some ways, there is not much evidence that it inhibits access to a college education. In 1960, women comprised only about a third of the undergraduate college population and were excluded from most of the Ivy League colleges and a number of public colleges such as the University of Virginia. Today, women comprise approximately 55 percent of the nation's 14 million college students. U.S. Dep't of Commerce, STATISTICAL ABSTRACT OF THE UNITED STATES 179 (1995). Women today are substantially more likely to graduate from high school and to attend college than their male counterparts. U.S. Dep't of Commerce, *supra*, at 152, 153, 168. As a statistical matter, our educational system seems to be shortchanging men more than

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[11]Indeed, some of the government's amici seem to recognize as much, since they go so far as to argue that the Court should overrule such recent decisions as *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995), and *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), in order to hold that benign discrimination is not subject to the same degree of scrutiny as invidious discrimination. Brief of the Employment Law Center, et al., at 25-30.

women.[12]

In short, the educational system in this country is and has been for many years fully open to women. As a result, the "remedial" justification for women's colleges would not likely survive constitutional scrutiny in the event the Court were to hold that publicly supported single-sex education for men is unconstitutional.

B. Private Institutions Will Face a Loss of Government Financial Support.

It is also illusory to think that the impact of a constitutional ruling on single-gender education could be limited to public institutions. Although MBC is a private college, it receives substantial amounts of state and federal financial support. In addition to financial support of the VWIL program, the Commonwealth provides tuition assistance grants for its residents who attend MBC. It is unlikely that MBC or any other private women's college could survive without some form of government financial assistance to the school or its students.[13]

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[12]The problem is particularly severe for African American males. Only 38.5 percent of black college students are male. U.S. Dep't of Commerce, *supra*, at 179.

[13]Public funds directly or indirectly provide a substantial portion of the operating budgets of private educational institutions. In the 1990-91 school year, private institutions of higher education derived approximately 19 percent of their budgets from federal, state, and local government funds, *not including* financial aid to students. *See* U.S. Department of Education, National Center for Education Statistics, DIGEST OF EDUCATION STATISTICS 38 and Note (1993). In addition, private colleges and universities benefited from massive public expenditures for student financial aid in the form of grants and scholarships, guaranteed student loan programs, work study payments, and the like. More than 49 percent of full-time

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If the Supreme Court holds that the Equal Protection Clause bars government-supported single-sex education at VMI, that holding could well result in the invalidation of most or all governmental financial support for students attending private single-sex schools. This is not to say that the receipt of government assistance turns colleges into "state actors" who violate the Constitution by discriminating on the basis of sex. Rather, it is the government itself that would violate the Constitution by subsidizing private discrimination in which it could not engage directly.

In *Norwood v. Harrison*, 413 U.S. 455 (1973), black students challenged a Mississippi statutory program under which textbooks were purchased by the State and loaned to all students attending public and private schools in the State, including private schools alleged to have racially discriminatory admissions policies. Noting that "[t]his Court has consistently affirmed decisions enjoining state tuition grants to students attending racially discriminatory private schools," the Supreme Court held that "[a] textbook lending program is not legally distinguishable from the forms of state assistance foreclosed by . . . [those] cases." *Id.* at 463 (footnote and citation omitted). Accordingly, the Court held that even indirect government aid to racially discriminatory schools was barred by the Equal Protection Clause:

> Racial discrimination in state-operated schools is barred by the Constitution and '[i]t is also axiomatic that **a state may not induce, encourage or promote private persons to accomplish what it is constitu-**

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students attending private non-profit undergraduate institutions in 1989-90 received some form of federal financial aid, and more than 30 percent received state financial aid. *Id.* at 313.

tionally forbidden to accomplish.'"

Id. at 463-65 (footnote and citation omitted) (emphasis added).[14]

The *Norwood* Court's holding was not dependent on any showing of a direct causal link between the challenged state program and the discriminatory conduct of the private actors: "[T]he Constitution does not permit the State to aid discrimination even when there is no precise causal relationship between state financial aid to a private school and the continued well-being of that school." *Id.* at 465-66. In the Court's view, "the constitutional infirmity of the Mississippi textbook program is that it significantly aids the organization and continuation of a separate system of private schools which . . . may discriminate if they so desire. **A State's constitutional obligation requires it to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination."** *Id.* at 467 (emphasis added).

Direct public financial assistance to private single-sex schools obviously "giv[es] significant aid to" those institutions. Like the textbook program invalidated in *Norwood*, moreover, federal and state financial aid to students attending private single-sex schools also provides substantial benefits to those schools. As the Supreme Court said in *Grove City College v. Bell*, 465 U.S. 555, 565-66 (1984), "[t]he economic effect of direct and indirect assistance often is indistinguishable," and Congress made clear its "awareness that the student assistance programs established

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[14] *Accord Cooper v. Aaron*, 358 U.S. 1, 19 (1958) ("State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the [Fourteenth] Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws.").

[by federal law] . . . would significantly aid colleges and universities." Under the holding of *Norwood*, if publicly supported single-sex education is unconstitutional, government financial aid to students attending private single-sex schools would appear to be equally impermissible.[15] Accordingly, an adverse decision in the VMI case could strike a severe financial blow to private single-sex education in this Nation both by invalidating all forms of direct public financial assistance to single-sex schools and by denying students at such schools access to a major source of financial aid.

C. Private Institutions Will Face a Loss of Charitable Tax Exemption and Tax Deductible Contributions.

Under the Internal Revenue Code, charitable organizations, including those organized for "educational" purposes, are generally exempt from federal income taxes, and taxpayers may deduct their contributions to such organizations. 26 U.S.C. §§ 170, 501(c)(3) (1988). In Rev. Rul. 71-447, 1971-2 C.B. 230, however, the IRS ruled that racially discriminatory private educational institutions are not entitled to these tax benefits. The IRS explained that "[a]ll charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy." *Id.* Because congressional enactments, judicial decisions, and the like evidenced a strong national policy against racial discrimination in education, the IRS concluded that racially discriminatory pri-

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[15] *See also Ridgefield Women's Political Caucus, Inc. v. Fossi*, 458 F. Supp. 117 (D. Conn. 1978) (Newman, J.) (applying *Norwood*, court enjoined town from conveying government property at below-market price to a private single-sex organization).

vate schools were contrary to this public policy and were therefore not "charitable" within the meaning of the Internal Revenue Code. *See also* Rev. Rul. 75-231, 1975-1 C.B. 158.

In *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), the Court upheld these IRS rulings, applying essentially the same rationale. Construing the tax code by reference to common-law principles, the Court first held that "an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy," because at common law "the purpose of a charitable trust may not be illegal or violate established public policy." *Id.* at 586, 591. The Court then concluded that racial discrimination in education is contrary to established public policy, pointing to cases such as *Brown v. Board of Education* that "establish[] beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy." *Id.* at 593. The Court also relied on congressional enactments prohibiting racial discrimination in federally funded educational programs and in other areas. *Id.* at 594.

Under the reasoning of Rev. Rul. 71-447 and *Bob Jones*, private single-sex educational and other charitable organizations could lose their tax-exempt status (and their all-important ability to receive tax-deductible charitable contributions) if public single-sex education such as that offered by VMI were declared unconstitutional. Indeed, one leading tax-law expert has already taken the position that a donation for educational purposes is contrary to public policy and generally not deductible if it discriminates on the basis of sex.[16] This argument would be difficult to re-

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[16] *See* Martin D. Ginsburg, *Sex Discrimination and the IRS: Public Policy and the Charitable Deduction*, 10 TAX NOTES 27, 28 (1980) (the "generally applicable federal policy against sex discrimination" precludes charitable-deduction treatment

[Footnote continued on next page]

fute if the Supreme Court were to invalidate public single-sex education in *VMI*. Just as *Brown v. Board of Education* demonstrated the public policy against racial discrimination in *all* education even though its holding and rationale applied only to public schools, so an unfavorable ruling in the VMI case would necessarily demonstrate a clear public policy against single-sex admissions policies in *all* education.[17] Even though Congress has not seen fit to prohibit such schools altogether,[18] this public policy could nevertheless preclude these schools and similar institutions from continuing to enjoy the benefits of tax-exempt status, and injured parties would be entitled to a judicial declaration precluding the IRS from according tax-exempt status or

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for a single-sex educational scholarship unless the donor can "show that the scholarship substantially furthers an important objective or is otherwise compatible with federal law"). Professor Ginsburg's article criticizes IRS Letter Ruling (Tech. Adv. Mem.) 77-44-007 (July 28, 1977), which upheld the deductibility of a contribution for a sex-restricted scholarship.

[17]The public policy against sex discrimination is sufficiently strong to constitute a compelling governmental interest. *See Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

[18]Title IX's prohibition against sex discrimination in federally funded education does not apply to most private educational institutions and contains an exemption for historically single-sex public institutions. *See* 20 U.S.C. § 1681(a)(1) & (5) (1988).

deductibility of contributions to such institutions.[19]

An unfavorable ruling in VMI would also threaten private single-sex schools and similar charitable organizations with loss of tax-exempt status for a separate and independent reason: under the rationale of *Norwood v. Harrison* and its progeny (discussed above), the Fourteenth Amendment and the equal protection component of the Fifth Amendment could be interpreted to preclude the federal and state governments from continuing to foster and support private sexual discrimination by extending tax-exempt status to organizations that engage in such behavior or by granting tax deductions to persons who contribute to such organizations.[20]

D. The Application of "Strict Scrutiny" Will Exacerbate the Threat to Private Women's Colleges.

Some of the government's *amici* have told the Court that cases such as *Norwood* and *Bob Jones* pose no threat to private women's colleges because these doctrines have been confined to situations involving race discrimination. Brief of Twenty-Six Private Women's Colleges at 19 n.12 & 20-23. Yet the rationale of these cases, as described above,

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[19] *See, e.g., Green v. Connally*, 330 F. Supp. 1150 (D.D.C.) (three-judge court), *aff'd*, 404 U.S. 997 (1971).

[20] *See, e.g., Falkenstein v. Department of Revenue*, 350 F. Supp. 887, 889 (D. Or. 1972) (three-judge court) ("the grant of tax exemptions to . . . a racially exclusive fraternal organization, violates the Equal Protection Clause of the Fourteenth Amendment and must be enjoined"), *appeal dismissed*, 409 U.S. 1099 (1973); *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972) (three-judge court); *Pitts v. Department of Revenue*, 333 F. Supp. 662, 669 (E.D. Wis. 1971) (three-judge court).

is broad enough to encompass other kinds of unconstitutional discrimination as well.

At the same time, the government and other of its *amici* have told this Court that sex discrimination should be treated the same as race discrimination and subjected to "strict scrutiny." Pet. Br. at 33-36; Brief of National Women's Law Center, *et al.*, at 15-30. Apart from whatever else could be said about such a legal development, it would certainly eliminate any remaining doubt that government assistance to private women's colleges would be viewed as unconstitutional.

CONCLUSION

For the reasons stated in this brief, *amicus curiae* Mary Baldwin College requests that this Court affirm the judgment of the court of appeals and permit it to continue implementation of the VWIL program.

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